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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1971

JUNE 26 THROUGH JUNE 29, 1972
END OF TERM

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM O. DOUGLAS, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.

RETIRED

EARL WARREN, Chief Justice.
STANLEY REED, Associate Justice.
TOM C. CLARK, Associate Justice.

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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

January 7, 1972.

(For next previous allotment, see 403 U. S., p. IV.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1971

LAIRD, SECRETARY OF DEFENSE, ET AL. *v.* TATUM ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-288. Argued March 27, 1972—Decided June 26, 1972

Prior to its being called upon in 1967 to assist local authorities in quelling civil disorders in Detroit, Michigan, the Department of the Army had developed only a general contingency plan in connection with its limited domestic mission under 10 U. S. C. § 331. In response to the Army's experience in the various civil disorders it was called upon to help control during 1967 and 1968, Army Intelligence established a data-gathering system, which respondents describe as involving the "surveillance of lawful civilian political activity." *Held:* Respondents' claim that their First Amendment rights are chilled, due to the mere existence of this data-gathering system, does not constitute a justiciable controversy on the basis of the record in this case, disclosing as it does no showing of objective harm or threat of specific future harm. Pp. 3-16.

144 U. S. App. D. C. 72, 444 F. 2d 947, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion in which MARSHALL, J., joined, *post*, p. 16. BRENNAN, J., filed a dissenting opinion in which STEWART and MARSHALL, JJ., joined, *post*, p. 38.

Solicitor General Griswold argued the cause for petitioners. With him on the briefs were *Assistant Attorney General Mardian* and *Robert L. Keuch.*

Frank Askin argued the cause for respondents. With him on the brief was *Melvin L. Wulf.*

Sam J. Ervin, Jr., argued the cause for the Unitarian Universalist Assn. et al. as *amici curiae* urging affirmance. With him on the brief was *Lawrence M. Baskir.*

Burke Marshall and *Arthur R. Miller* filed a brief for a Group of Former Army Intelligence Agents as *amici curiae* urging affirmance.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Respondents brought this class action in the District Court seeking declaratory and injunctive relief on their claim that their rights were being invaded by the Department of the Army's alleged "surveillance of lawful and peaceful civilian political activity." The petitioners in response described the activity as "gathering by lawful means . . . [and] maintaining and using in their intelligence activities . . . information relating to potential or actual civil disturbances [or] street demonstrations." In connection with respondents' motion for a preliminary injunction and petitioners' motion to dismiss the complaint, both parties filed a number of affidavits with the District Court and presented their oral arguments at a hearing on the two motions. On the basis of the pleadings,[1] the affidavits before the court, and the oral arguments advanced at the hearing, the

[1] The complaint filed in the District Court candidly asserted that its factual allegations were based on a magazine article: "The information contained in the foregoing paragraphs numbered five through thirteen [of the complaint] was published in the January 1970 issue of the magazine *The Washington Monthly* . . . ."

District Court granted petitioners' motion to dismiss, holding that there was no justiciable claim for relief.

On appeal, a divided Court of Appeals reversed and ordered the case remanded for further proceedings. We granted certiorari to consider whether, as the Court of Appeals held, respondents presented a justiciable controversy in complaining of a "chilling" effect on the exercise of their First Amendment rights where such effect is allegedly caused, not by any "specific action of the Army against them, [but] only [by] the existence and operation of the intelligence gathering and distributing system, which is confined to the Army and related civilian investigative agencies." 144 U. S. App. D. C. 72, 78, 444 F. 2d 947, 953. We reverse.

(1)

There is in the record a considerable amount of background information regarding the activities of which respondents complained; this information is set out primarily in the affidavits that were filed by the parties in connection with the District Court's consideration of respondents' motion for a preliminary injunction and petitioners' motion to dismiss. See Fed. Rule Civ. Proc. 12(b). A brief review of that information is helpful to an understanding of the issues.

The President is authorized by 10 U. S. C. § 331 [2] to make use of the armed forces to quell insurrection

[2] "Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection."

The constitutionality of this statute is not at issue here; the specific authorization of such use of federal armed forces, in addition to state militia, appears to have been enacted pursuant to Art. IV, § 4, of the Constitution, which provides that "[t]he United

and other domestic violence if and when the conditions described in that section obtain within one of the States. Pursuant to those provisions, President Johnson ordered

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States . . . shall protect each of [the individual States] . . . on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

In describing the requirement of 10 U. S. C. § 331 for the use of federal troops to quell domestic disorders, Attorney General Ramsey Clark made the following statements in a letter sent to all state governors on August 7, 1967:

"There are three basic prerequisites to the use of Federal troops in a state in the event of domestic violence:

"(1) That a situation of serious 'domestic violence' exists within the state. While this conclusion should be supported with a statement of factual details to the extent feasible under the circumstances, there is no prescribed wording.

"(2) That such violence cannot be brought under control by the law enforcement resources available to the governor, including local and State police forces and the National Guard. The judgment required here is that there is a definite need for the assistance of Federal troops, taking into account the remaining time needed to move them into action at the scene of violence.

"(3) That the legislature or the governor requests the President to employ the armed forces to bring the violence under control. The element of request by the governor of a State is essential if the legislature cannot be convened. It may be difficult in the context of urban rioting, such as we have seen this summer, to convene the legislature.

"These three elements should be expressed in a written communication to the President, which of course may be a telegram, to support his issuance of a proclamation under 10 U. S. C. § 334 and commitment of troops to action. In case of extreme emergency, receipt of a written request will not be a prerequisite to Presidential action. However, since it takes several hours to alert and move Federal troops, the few minutes needed to write and dispatch a telegram are not likely to cause any delay.

"Upon receiving the request from a governor, the President, under the terms of the statute and the historic practice, must exercise his own judgment as to whether Federal troops will be sent, and as to such questions as timing, size of the force, and federalization of the National Guard.

"Preliminary steps, such as alerting the troops, can be taken by

federal troops to assist local authorities at the time of the civil disorders in Detroit, Michigan, in the summer of 1967 and during the disturbances that followed the assassination of Dr. Martin Luther King. Prior to the Detroit disorders, the Army had a general contingency plan for providing such assistance to local authorities, but the 1967 experience led Army authorities to believe that more attention should be given to such preparatory planning. The data-gathering system here involved is said to have been established in connection with the development of more detailed and specific contingency planning designed to permit the Army, when called upon to assist local authorities, to be able to respond effectively with a minimum of force. As the Court of Appeals observed,

> "In performing this type function the Army is essentially a police force or the back-up of a local police force. To quell disturbances or to prevent further disturbances the Army needs the same tools and, most importantly, the same information to which local police forces have access. Since the Army is sent into territory almost invariably unfamiliar to most soldiers and their commanders, their need for information is likely to be greater than that of the hometown policeman.
>
> "No logical argument can be made for compelling the military to use *blind* force. When force is em-

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the Federal government upon oral communications and prior to the governor's determination that the violence cannot be brought under control without the aid of Federal forces. Even such preliminary steps, however, represent a most serious departure from our traditions of local responsibility for law enforcement. They should not be requested until there is a substantial likelihood that the Federal forces will be needed."

This analysis of Attorney General Clark suggests the importance of the need for information to guide the intelligent use of military forces and to avoid "overkill."

> ployed it should be intelligently directed, and this depends upon having reliable information—in time. As Chief Justice John Marshall said of Washington, 'A general must be governed by his intelligence and must regulate his measures by his information. It is his duty to obtain correct information . . . .' So we take it as undeniable that the military, *i. e.*, the Army, need a certain amount of information in order to perform their constitutional and statutory missions." 144 U. S. App. D. C., at 77–78, 444 F. 2d, at 952–953 (footnotes omitted).

The system put into operation as a result of the Army's 1967 experience consisted essentially of the collection of information about public activities that were thought to have at least some potential for civil disorder, the reporting of that information to Army Intelligence headquarters at Fort Holabird, Maryland, the dissemination of these reports from headquarters to major Army posts around the country, and the storage of the reported information in a computer data bank located at Fort Holabird. The information itself was collected by a variety of means, but it is significant that the principal sources of information were the news media and publications in general circulation. Some of the information came from Army Intelligence agents who attended meetings that were open to the public and who wrote field reports describing the meetings, giving such data as the name of the sponsoring organization, the identity of speakers, the approximate number of persons in attendance, and an indication of whether any disorder occurred. And still other information was provided to the Army by civilian law enforcement agencies.

The material filed by the Government in the District Court reveals that Army Intelligence has field offices in various parts of the country; these offices are staffed in the aggregate with approximately 1,000 agents, 94%

of whose time [3] is devoted to the organization's principal mission,[4] which is unrelated to the domestic surveillance system here involved.

By early 1970 Congress became concerned with the scope of the Army's domestic surveillance system; hearings on the matter were held before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary. Meanwhile, the Army, in the course of a review of the system, ordered a significant reduction in its scope. For example, information referred to in the complaint as the "blacklist" and the records in the computer data bank at Fort Holabird were found unnecessary and were destroyed, along with other related records. One copy of all the material relevant to the instant suit was retained, however, because of the pendency of this litigation. The review leading to the destruction of these records was said at the time the District Court ruled on petitioners' motion to dismiss to be a "continuing" one (App. 82), and the Army's policies at that time were represented as follows in a letter from the Under Secretary of the Army to Senator Sam J. Ervin, Chairman of the Senate Subcommittee on Constitutional Rights:

> "[R]eports concerning civil disturbances will be limited to matters of immediate concern to the Army—that is, reports concerning outbreaks of violence or incidents with a high potential for violence beyond the capability of state and local police and

[3] Translated in terms of personnel, this percentage figure suggests that the total intelligence operation concerned with potential civil disorders hardly merits description as "massive," as one of the dissents characterizes it.

[4] That principal mission was described in one of the documents filed with the District Court as the conducting of "investigations to determine whether uniformed members of the Army, civilian employees [of the Army] and contractors' employees should be granted access to classified information." App. 76–77.

> the National Guard to control. These reports will be collected by liaison with other Government agencies and reported by teletype to the Intelligence Command. They will not be placed in a computer . . . . These reports are destroyed 60 days after publication or 60 days after the end of the disturbance. This limited reporting system will ensure that the Army is prepared to respond to whatever directions the President may issue in civil disturbance situations and without 'watching' the lawful activities of civilians." (App. 80.)

In briefs for petitioners filed with this Court, the Solicitor General has called our attention to certain directives issued by the Army and the Department of Defense subsequent to the District Court's dismissal of the action; these directives indicate that the Army's review of the needs of its domestic intelligence activities has indeed been a continuing one and that those activities have since been significantly reduced.

(2)

The District Court held a combined hearing on respondents' motion for a preliminary injunction and petitioners' motion for dismissal and thereafter announced its holding that respondents had failed to state a claim upon which relief could be granted. It was the view of the District Court that respondents failed to allege any action on the part of the Army that was unlawful in itself and further failed to allege any injury or any realistic threats to their rights growing out of the Army's actions.[5]

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[5] In the course of the oral argument, the District Judge sought clarification from respondents' counsel as to the nature of the threats perceived by respondents; he asked what exactly it was in the Army's activities that tended to chill respondents and others in

In reversing, the Court of Appeals noted that respondents "have some difficulty in establishing visible injury":

> "[They] freely admit that they complain of no specific action of the Army against them . . . . There is no evidence of illegal or unlawful surveillance activities. We are not cited to any clandestine intrusion by a military agent. So far as is yet shown, the information gathered is nothing more than a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand." 144 U. S. App. D. C., at 78, 444 F. 2d, at 953.

The court took note of petitioners' argument "that nothing [detrimental to respondents] has been done, that nothing is contemplated to be done, and even if some action by the Army against [respondents] were possibly foreseeable, such would not present a presently justiciable controversy." With respect to this argument, the Court of Appeals had this to say:

> "This position of the [petitioners] does not accord full measure to the rather unique argument advanced by appellants [respondents]. While [respondents] do indeed argue that in the future it is possible that

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the exercise of their constitutional rights. Counsel responded that it was

"precisely the threat in this case that *in some future civil disorder* of some kind, the Army is going to come in with its list of troublemakers . . . and go rounding up people and putting them in military prisons somewhere." (Emphasis added.)

To this the court responded that "we still sit here with the writ of habeas corpus." At another point, counsel for respondents took a somewhat different approach in arguing that

"*we're not quite sure exactly what they have in mind* and that is precisely what causes the chill, the chilling effect." (Emphasis added.)

> information relating to matters far beyond the responsibilities of the military may be misused by the military to the detriment of these civilian [respondents], yet [respondents] do not attempt to establish this as a definitely foreseeable event, or to base their complaint on this ground. Rather, [respondents] contend that the *present existence of this system* of gathering and distributing information, allegedly far beyond the mission requirements of the Army, constitutes an impermissible burden on [respondents] and other persons similarly situated which exercises a *present inhibiting effect* on their full expression and utilization of their First Amendment rights . . . ." *Id.*, at 79, 444 F. 2d, at 954. (Emphasis in original.)

Our examination of the record satisfies us that the Court of Appeals properly identified the issue presented, namely, whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose. We conclude, however, that, having properly identified the issue, the Court of Appeals decided that issue incorrectly.[6]

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[6] Indeed, the Court of Appeals noted that it had reached a different conclusion when presented with a virtually identical issue in another of its recently decided cases, *Davis* v. *Ichord*, 143 U. S. App. D. C. 183, 442 F. 2d 1207 (1970). The plaintiffs in *Davis* were attacking the constitutionality of the House of Representatives Rule under which the House Committee on Internal Security conducts investigations and maintains files described by the plaintiffs as a "political blacklist." The court noted that any chilling effect to which the plaintiffs were subject arose from the mere existence

In recent years this Court has found in a number of cases that constitutional violations may arise from the deterrent, or "chilling," effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights. *E. g., Baird* v. *State Bar of Arizona,* 401 U. S. 1 (1971); *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967); *Lamont* v. *Postmaster General,* 381 U. S. 301 (1965); *Baggett* v. *Bullitt,* 377 U. S. 360 (1964). In none of these cases, however, did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some *other* and additional action detrimental to that individual. Rather, in each of these cases, the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging.

For example, the petitioner in *Baird* v. *State Bar of Arizona* had been denied admission to the bar solely because of her refusal to answer a question regarding the organizations with which she had been associated in the past. In announcing the judgment of the Court,

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of the Committee and its files and the mere possibility of the misuse of those files. In affirming the dismissal of the complaint, the court concluded that allegations of such a chilling effect could not be elevated to a justiciable claim merely by alleging as well that the challenged House Rule was overly broad and vague.

In deciding the case presently under review, the Court of Appeals distinguished *Davis* on the ground that the difference in the source of the chill in the two cases—a House Committee in *Davis* and the Army in the instant case—was controlling. We cannot agree that the jurisdictional question with which we are here concerned is to be resolved on the basis of the identity of the parties named as defendants in the complaint.

Mr. Justice Black said that "a State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes." 401 U. S., at 7. Some of the teachers who were the complainants in *Keyishian* v. *Board of Regents* had been discharged from employment by the State, and the others were threatened with such discharge, because of their political acts or associations. The Court concluded that the State's "complicated and intricate scheme" of laws and regulations relating to teacher loyalty could not withstand constitutional scrutiny; it was not permissible to inhibit First Amendment expression by forcing a teacher to "guess what conduct or utterance" might be in violation of that complex regulatory scheme and might thereby "lose him his position." 385 U. S., at 604. *Lamont* v. *Postmaster General* dealt with a governmental regulation requiring private individuals to make a special written request to the Post Office for delivery of each individual mailing of certain kinds of political literature addressed to them. In declaring the regulation invalid, the Court said: "The addressee carries an affirmative obligation which we do not think the Government may impose on him." 381 U. S., at 307. *Baggett* v. *Bullitt* dealt with a requirement that an oath of vague and uncertain meaning be taken as a condition of employment by a governmental agency. The Court said: "Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited." 377 U. S., at 372.

The decisions in these cases fully recognize that governmental action may be subject to constitutional challenge even though it has only an indirect effect on the

exercise of First Amendment rights. At the same time, however, these decisions have in no way eroded the

> "established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action . . . ." *Ex parte Levitt*, 302 U. S. 633, 634 (1937).

The respondents do not meet this test; their claim, simply stated, is that they disagree with the judgments made by the Executive Branch with respect to the type and amount of information the Army needs and that the very existence of the Army's data-gathering system produces a constitutionally impermissible chilling effect upon the exercise of their First Amendment rights. That alleged "chilling" effect may perhaps be seen as arising from respondents' very perception of the system as inappropriate to the Army's role under our form of government, or as arising from respondents' beliefs that it is inherently dangerous for the military to be concerned with activities in the civilian sector, or as arising from respondents' less generalized yet speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause direct harm to respondents.[7] Allegations of a subjective "chill"

[7] Not only have respondents left somewhat unclear the precise connection between the mere existence of the challenged system and their own alleged chill, but they have also cast considerable doubt on whether they themselves are in fact suffering from any such chill. Judge MacKinnon took cogent note of this difficulty in dissenting from the Court of Appeals' judgment, rendered as it was "on the facts of the case which emerge from the pleadings, affidavits and the admissions made to the trial court." 144 U. S. App. D. C., at 84, 444 F. 2d, at 959. At the oral argument before the District Court, counsel for respondents admitted that his clients

are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; "the federal courts established pursuant to Article III of the Constitution do not render advisory opinions." *United Public Workers* v. *Mitchell*, 330 U. S. 75, 89 (1947).

Stripped to its essentials, what respondents appear to be seeking is a broad-scale investigation, conducted by themselves as private parties armed with the subpoena power of a federal district court and the power of cross-examination, to probe into the Army's intelligence-gathering activities, with the district court determining at the conclusion of that investigation the extent to which those activities may or may not be appropriate to the Army's mission. The following excerpt from the opinion of the Court of Appeals suggests the broad sweep implicit in its holding:

> "Apparently in the judgment of the civilian head of the Army not everything being done in the operation of this intelligence system was necessary to the performance of the military mission. *If the Secretary of the Army can formulate and implement such judgment based on facts within his De-*

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were "not people, obviously, who are cowed and chilled"; indeed, they were quite willing "to open themselves up to public investigation and public scrutiny." But, counsel argued, these respondents must "represent millions of Americans not nearly as forward [and] courageous" as themselves. It was Judge MacKinnon's view that this concession "constitutes a basic denial of practically their whole case." *Ibid.* Even assuming a justiciable controversy, if respondents themselves are not chilled, but seek only to represent those "millions" whom they believe are so chilled, respondents clearly lack that "personal stake in the outcome of the controversy" essential to standing. *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). As the Court recently observed in *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 166, a litigant "has standing to seek redress for injuries done to him, but may not seek redress for injuries done to others."

> *partmental knowledge, the United States District Court can hear evidence, ascertain the facts, and decide what, if any, further restrictions on the complained-of activities are called for* to confine the military to their legitimate sphere of activity and to protect [respondents'] allegedly infringed constitutional rights." 144 U. S. App. D. C., at 83, 444 F. 2d, at 958. (Emphasis added.)

Carried to its logical end, this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the "power of the purse"; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action.

We, of course, intimate no view with respect to the propriety or desirability, from a policy standpoint, of the challenged activities of the Department of the Army; our conclusion is a narrow one, namely, that on this record the respondents have not presented a case for resolution by the courts.

The concerns of the Executive and Legislative Branches in response to disclosure of the Army surveillance activities—and indeed the claims alleged in the complaint—reflect a traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the Third Amendment's explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military. Those prohibitions are not directly presented by this case, but their philosophical underpinnings explain our traditional insistence on limitations on military operations in peacetime. Indeed, when presented with claims of judicially cognizable in-

jury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MARSHALL concurs, dissenting.

I

If Congress had passed a law authorizing the armed services to establish surveillance over the civilian population, a most serious constitutional problem would be presented. There is, however, no law authorizing surveillance over civilians, which in this case the Pentagon concededly had undertaken. The question is whether such authority may be implied. One can search the Constitution in vain for any such authority.

The start of the problem is the constitutional distinction between the "militia" and the Armed Forces. By Art. I, § 8, of the Constitution the militia is specifically confined to precise duties: "to execute the Laws of the Union, suppress Insurrections and repel Invasions."

This obviously means that the "militia" cannot be sent overseas to fight wars. It is purely a domestic arm of the governors of the several States,[1] save as it may be called under Art. I, § 8, of the Constitution into the federal service. Whether the "militia" could be

[1] I have expressed my doubts whether the "militia" loses its constitutional role by an Act of Congress which incorporates it in the armed services. *Drifka* v. *Brainard*, 89 S. Ct. 434, 21 L. Ed. 2d 427.

given powers comparable to those granted the FBI is a question not now raised, for we deal here not with the "militia" but with "armies." The Army, Navy, and Air Force are comprehended in the constitutional term "armies." Article I, § 8, provides that Congress may "raise and support Armies," and "provide and maintain a Navy," and make "Rules for the Government and Regulation of the land and naval Forces." And the Fifth Amendment excepts from the requirement of a presentment or indictment of a grand jury "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."

Acting under that authority, Congress has provided a code governing the Armed Services. That code sets the procedural standards for the Government and regulation of the land and naval forces. It is difficult to imagine how those powers can be extended to military surveillance over civilian affairs.[2]

The most pointed and relevant decisions of the Court on the limitation of military authority concern the attempt of the military to try civilians. The first leading case was *Ex parte Milligan*, 4 Wall. 2, 124, where the Court noted that the conflict between "civil liberty" and "martial law" is "irreconcilable." The Court which made that announcement would have been horrified at the prospect of the military—absent a regime of martial law—establishing a regime of surveillance over civilians. The power of the military to establish such a system is obviously less than the power of Congress to authorize such surveillance. For the authority of Congress is restricted by its power to "raise" armies, Art. I, § 8; and, to repeat, its authority over the Armed Forces is stated in these terms, "To make Rules for the Government and Regulation of the land and naval Forces."

[2] See Appendix I to this opinion, *infra*, p. 29.

The Constitution contains many provisions guaranteeing rights to persons. Those include the right to indictment by a grand jury and the right to trial by a jury of one's peers. They include the procedural safeguards of the Sixth Amendment in criminal prosecutions; the protection against double jeopardy, cruel and unusual punishments—and, of course, the First Amendment. The alarm was sounded in the Constitutional Convention about the dangers of the armed services. Luther Martin of Maryland said, "when a government wishes to deprive its citizens of freedom, and reduce them to slavery, it generally makes use of a standing army." [3] That danger, we have held, exists not only in bold acts of usurpation of power, but also in gradual encroachments. We held that court-martial jurisdiction cannot be extended to reach any person not a member of the Armed Forces at the times both of the offense and of the trial, which eliminates discharged soldiers. *Toth* v. *Quarles,* 350 U. S. 11. Neither civilian employees of the Armed Forces overseas, *McElroy* v. *Guagliardo,* 361 U. S. 281; *Grisham* v. *Hagan,* 361 U. S. 278, nor civilian dependents of military personnel accompanying them overseas, *Kinsella* v. *Singleton,* 361 U. S. 234; *Reid* v. *Covert,* 354 U. S. 1, may be tried by court-martial. And even as respects those in the Armed Forces we have held that an offense must be "service connected" to be tried by court-martial rather than by a civilian tribunal. *O'Callahan* v. *Parker,* 395 U. S. 258, 272.

The upshot is that the Armed Services—as distinguished from the "militia"—are not regulatory agencies or bureaus that may be created as Congress desires and granted such powers as seem necessary and proper. The authority to provide rules "governing" the Armed Services means the grant of authority to the Armed

[3] 3 M. Farrand, Records of the Federal Convention 209 (1911).

Services to govern themselves, not the authority to govern civilians. Even when "martial law" is declared, as it often has been, its appropriateness is subject to judicial review, *Sterling* v. *Constantin*, 287 U. S. 378, 401, 403-404.[4]

Our tradition reflects a desire for civilian supremacy and subordination of military power. The tradition goes back to the Declaration of Independence, in which it was recited that the King "has affected to render the Military independent of and superior to the Civil power." Thus, we have the "militia" restricted to domestic use, the restriction of appropriations to the "armies" to two years, Art. I, § 8, and the grant of command over the armies and the militia when called into actual service of the United States to the President, our chief civilian officer. The tradition of civilian control over the Armed Forces was stated by Chief Justice Warren: [5]

> "The military establishment is, of course, a necessary organ of government; but the reach of its power must be carefully limited lest the delicate balance between freedom and order be upset. The maintenance of the balance is made more difficult by

[4] Even some actions of the Armed Services in regulating their own conduct may be properly subjected to judicial scrutiny. Those who are not yet in the Armed Services have the protection of the full panoply of the laws governing admission procedures, see, *e. g.*, *McKart* v. *United States*, 395 U. S. 185; *Oestereich* v. *Selective Service Board*, 393 U. S. 233. Those in the service may use habeas corpus to test the jurisdiction of the Armed Services to try or detain them, see, *e. g.*, *Parisi* v. *Davidson*, 405 U. S. 34; *Noyd* v. *Bond*, 395 U. S. 683, 696 n. 8; *Reid* v. *Covert*, 354 U. S. 1; *Billings* v. *Truesdell*, 321 U. S. 542. And, those in the Armed Services may seek the protection of civilian, rather than military, courts when charged with crimes not service connected, *O'Callahan* v. *Parker*, 395 U. S. 258.

[5] The Bill of Rights and the Military, 37 N. Y. U. L. Rev. 181, 182, 193 (1962).

the fact that while the military serves the vital function of preserving the existence of the nation, it is, at the same time, the one element of government that exercises a type of authority not easily assimilated in a free society. . . .

. . . . . .

"In times of peace, the factors leading to an extraordinary deference to claims of military necessity have naturally not been as weighty. This has been true even in the all too imperfect peace that has been our lot for the past fifteen years—and quite rightly so, in my judgment. It is instructive to recall that our Nation at the time of the Constitutional Convention was also faced with formidable problems. The English, the French, the Spanish, and various tribes of hostile Indians were all ready and eager to subvert or occupy the fledgling Republic. Nevertheless, in that environment, our Founding Fathers conceived a Constitution and Bill of Rights replete with provisions indicating their determination to protect human rights. There was no call for a garrison state in those times of precarious peace. We should heed no such call now. If we were to fail in these days to enforce the freedom that until now has been the American citizen's birthright, we would be abandoning for the foreseeable future the constitutional balance of powers and rights in whose name we arm."

Thus, we have until today consistently adhered to the belief that

"[i]t is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires." *Raymond* v. *Thomas*, 91 U. S. 712, 716.

It was in that tradition that *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, was decided, in which President Truman's seizure of the steel mills in the so-called Korean War was held unconstitutional. As stated by Justice Black:

> "The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities." *Id.*, at 587.

Madison expressed the fear of military dominance: [6]

> "The veteran legions of Rome were an overmatch for the undisciplined valor of all other nations, and rendered her the mistress of the world.
>
> "Not the less true is it, that the liberties of Rome proved the final victim to her military triumphs; and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments. A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale it has its inconveniences. On an extensive

[6] The Federalist No. 41.

> scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution. A wise nation will combine all these considerations; and, whilst it does not rashly preclude itself from any resource which may become essential to its safety, will exert all its prudence in diminishing both the necessity and the danger of resorting to one which may be inauspicious to its liberties.
>
> "The clearest marks of this prudence are stamped on the proposed Constitution. The Union itself, which it cements and secures, destroys every pretext for a military establishment which could be dangerous. America united, with a handful of troops, or without a single soldier, exhibits a more forbidding posture to foreign ambition than America disunited, with a hundred thousand veterans ready for combat."

As Chief Justice Warren has observed, the safeguards in the main body of the Constitution did not satisfy the people on their fear and concern of military dominance: [7]

> "They were reluctant to ratify the Constitution without further assurances, and thus we find in the Bill of Rights Amendments 2 and 3, specifically authorizing a decentralized militia, guaranteeing the right of the people to keep and bear arms, and prohibiting the quartering of troops in any house in time of peace without the consent of the owner. Other Amendments guarantee the right of the people to assemble, to be secure in their homes against unreasonable searches and seizures, and in criminal cases to be accorded a speedy and public trial by an impartial jury after indictment in the district

[7] N. 5, *supra*, at 185.

> and state wherein the crime was committed. The only exceptions made to these civilian trial procedures are for cases arising in the land and naval forces. Although there is undoubtedly room for argument based on the frequently conflicting sources of history, it is not unreasonable to believe that our Founders' determination to guarantee the preeminence of civil over military power was an important element that prompted adoption of the Constitutional Amendments we call the Bill of Rights."

The action in turning the "armies" loose on surveillance of civilians was a gross repudiation of our traditions. The military, though important to us, is subservient and restricted purely to military missions. It even took an Act of Congress to allow a member of the Joint Chiefs of Staff to address the Congress; [8] and that small step did not go unnoticed but was in fact viewed with alarm by those respectful of the civilian tradition. Walter Lippmann has written that during World War II, he was asked to convey a message to Winston Churchill, while the latter was in Washington together with his chiefs of staff. It was desired that Churchill should permit his chiefs of staff to testify before Congress as to the proper strategy for waging the war. Lippmann explains, however, that he "never finished the message. For the old lion let out a roar

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[8] The National Security Act of 1947, amended by § 5 of the Act of Aug. 10, 1949, 63 Stat. 580, provided in § 202 (c) (6):

"No provision of this Act shall be so construed as to prevent a Secretary of a military department or a member of the Joint Chiefs of Staff from presenting to the Congress, on his own initiative, after first so informing the Secretary of Defense, any recommendation relating to the Department of Defense that he may deem proper." See H. R. Conf. Rep. No. 1142, 81st Cong., 1st Sess., 18. This provision is now codified as 10 U. S. C. § 141 (e).

demanding to know why I was so ignorant of the British way of doing things that I could dare to suggest that a British general should address a parliamentary body.

> "As I remember it, what he said was 'I am the Minister of Defense and I, not the generals, will state the policy of His Majesty's government.' " The Intervention of the General, Washington Post, Apr. 27, 1967, Sec. A, p. 21, col. 1.[9]

The act of turning the military loose on civilians even if sanctioned by an Act of Congress, which it has not been, would raise serious and profound constitutional questions. Standing as it does only on brute power and Pentagon policy, it must be repudiated as a usurpation dangerous to the civil liberties on which free men are dependent. For, as Senator Sam Ervin has said, "this claim of an inherent executive branch power of investigation and surveillance on the basis of people's beliefs and attitudes may be more of a threat to our internal security than any enemies beyond our borders." Privacy and Government Investigations, 1971 U. Ill. L. F. 137, 153.

II

The claim that respondents have no standing to challenge the Army's surveillance of them and the other members of the class they seek to represent is too transparent for serious argument. The surveillance of the Army over the civilian sector—a part of society hitherto immune from its control—is a serious charge. It is alleged that the Army maintains files on the membership, ideology, programs, and practices of virtually every activist political group in the country, including groups such as the Southern Christian Leadership Conference, Clergy

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[9] The full account is contained in Appendix II, *infra*, at 33.

and Laymen United Against the War in Vietnam, the American Civil Liberties Union, Women's Strike for Peace, and the National Association for the Advancement of Colored People. The Army uses undercover agents to infiltrate these civilian groups and to reach into confidential files of students and other groups. The Army moves as a secret group among civilian audiences, using cameras and electronic ears for surveillance. The data it collects are distributed to civilian officials in state, federal, and local governments and to each military intelligence unit and troop command under the Army's jurisdiction (both here and abroad); and these data are stored in one or more data banks.

Those are the allegations; and the charge is that the purpose and effect of the system of surveillance is to harass and intimidate the respondents and to deter them from exercising their rights of political expression, protest, and dissent "by invading their privacy, damaging their reputations, adversely affecting their employment and their opportunities for employment, and in other ways." Their fear is that "permanent reports of their activities will be maintained in the Army's data bank, and their 'profiles' will appear in the so-called 'Blacklist' and that all of this information will be released to numerous federal and state agencies upon request."

Judge Wilkey, speaking for the Court of Appeals, properly inferred that this Army surveillance "exercises a *present inhibiting effect* on their full expression and utilization of their First Amendment rights." 144 U. S. App. D. C. 72, 79, 444 F. 2d 947, 954. That is the test. The "deterrent effect" on First Amendment rights by government oversight marks an unconstitutional intrusion, *Lamont* v. *Postmaster General*, 381 U. S. 301, 307. Or, as stated by MR. JUSTICE BRENNAN, "inhibition as well as prohibition against the exercise of precious First

Amendment rights is a power denied to government." *Id.*, at 309. When refusal of the Court to pass on the constitutionality of an Act under the normal consideration of forbearance "would itself have an inhibitory effect on freedom of speech" then the Court will act. *United States* v. *Raines*, 362 U. S. 17, 22.

As stated by the Supreme Court of New Jersey, "there is good reason to permit the strong to speak for the weak or the timid in First Amendment matters." *Anderson* v. *Sills*, 56 N. J. 210, 220, 265 A. 2d 678, 684 (1970).

One need not wait to sue until he loses his job or until his reputation is defamed. To withhold standing to sue until that time arrives would in practical effect immunize from judicial scrutiny all surveillance activities, regardless of their misuse and their deterrent effect. As stated in *Flast* v. *Cohen*, 392 U. S. 83, 101, "in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." Or, as we put it in *Baker* v. *Carr*, 369 U. S. 186, 204, the gist of the standing issue is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."

The present controversy is not a remote, imaginary conflict. Respondents were targets of the Army's surveillance. First, the surveillance was not casual but massive and comprehensive. Second, the intelligence reports were regularly and widely circulated and were exchanged with reports of the FBI, state and municipal police departments, and the CIA. Third, the Army's

surveillance was not collecting material in public records but staking out teams of agents, infiltrating undercover agents, creating command posts inside meetings, posing as press photographers and newsmen, posing as TV newsmen, posing as students, and shadowing public figures.

Finally, we know from the hearings conducted by Senator Ervin that the Army has misused or abused its reporting functions. Thus, Senator Ervin concluded that reports of the Army have been "taken from the Intelligence Command's highly inaccurate civil disturbance teletype and filed in Army dossiers on persons who have held, or were being considered for, security clearances, thus contaminating what are supposed to be investigative reports with unverified gossip and rumor. This practice directly jeopardized the employment and employment opportunities of persons seeking sensitive positions with the federal government or defense industry." [10]

Surveillance of civilians is none of the Army's constitutional business and Congress has not undertaken to entrust it with any such function. The fact that since this litigation started the Army's surveillance may have been cut back is not an end of the matter. Whether there has been an actual cutback or whether the announcements are merely a ruse can be determined only after a hearing in the District Court. We are advised by an *amicus curiae* brief filed by a group of former Army Intelligence Agents that Army surveillance of civilians is rooted in secret programs of long standing:

> "Army intelligence has been maintaining an unauthorized watch over civilian political activity for nearly 30 years. Nor is this the first time that

[10] Hearings on Federal Data Banks, Computers and the Bill of Rights, before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 92d Cong., 1st Sess. (1971).

> Army intelligence has, without notice to its civilian superiors, overstepped its mission. From 1917 to 1924, the Corps of Intelligence Police maintained a massive surveillance of civilian political activity which involved the use of hundreds of civilian informants, the infiltration of civilian organizations and the seizure of dissenters and unionists, sometimes without charges. That activity was opposed—then as now—by civilian officials on those occasions when they found out about it, but it continued unabated until post-war disarmament and economies finally eliminated the bureaucracy that conducted it." Pp. 29–30.

This case involves a cancer in our body politic. It is a measure of the disease which afflicts us. Army surveillance, like Army regimentation, is at war with the principles of the First Amendment. Those who already walk submissively will say there is no cause for alarm. But submissiveness is not our heritage. The First Amendment was designed to allow rebellion to remain as our heritage. The Constitution was designed to keep government off the backs of the people. The Bill of Rights was added to keep the precincts of belief and expression, of the press, of political and social activities free from surveillance. The Bill of Rights was designed to keep agents of government and official eavesdroppers away from assemblies of people. The aim was to allow men to be free and independent and to assert their rights against government. There can be no influence more paralyzing of that objective than Army surveillance. When an intelligence officer looks over every nonconformist's shoulder in the library, or walks invisibly by his side in a picket line, or infiltrates his club, the America once extolled as the voice of liberty heard around the world no longer is

cast in the image which Jefferson and Madison designed, but more in the Russian image, depicted in Appendix III to this opinion.

APPENDIX I TO OPINION OF DOUGLAS, J., DISSENTING

The narrowly circumscribed domestic role which Congress has by statute authorized the Army to play is clearly an insufficient basis for the wholesale civilian surveillance of which respondents complain. The entire domestic mission of the armed services is delimited by nine statutes.

Four define the Army's narrow role as a back-up for civilian authority where the latter has proved insufficient to cope with insurrection:

10 U. S. C. § 331:

"Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection."

10 U. S. C. § 332:

"Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion."

10 U. S. C. § 333:

"The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

"(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

"(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

"In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution."

10 U. S. C. § 334:

"Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time."

Two statutes, passed as a result of Reconstruction Era military abuses, prohibit military interference in civilian elections:

18 U. S. C. § 592:

"Whoever, being an officer of the Army or Navy, or other person in the civil, military, or naval service of the United States, orders, brings, keeps, or has under his authority or control any troops or armed men at any place where a general or special election is held, unless such force be necessary to repel armed enemies of the

United States, shall be fined not more than $5,000 or imprisoned not more than five years, or both; and be disqualified from holding any office of honor, profit, or trust under the United States.

"This section shall not prevent any officer or member of the armed forces of the United States from exercising the right of suffrage in any election district to which he may belong, if otherwise qualified according to the laws of the State in which he offers to vote."

18 U. S. C. § 593:

"Whoever, being an officer or member of the Armed Forces of the United States, prescribes or fixes or attempts to prescribe or fix, whether by proclamation, order or otherwise, the qualifications of voters at any election in any State; or

"Whoever, being such officer or member, prevents or attempts to prevent by force, threat, intimidation, advice or otherwise any qualified voter of any State from fully exercising the right of suffrage at any general or special election; or

"Whoever, being such officer or member, orders or compels or attempts to compel any election officer in any State to receive a vote from a person not legally qualified to vote; or

"Whoever, being such officer or member, imposes or attempts to impose any regulations for conducting any general or special election in a State, different from those prescribed by law; or

"Whoever, being such officer or member, interferes in any manner with an election officer's discharge of his duties—

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both; and disqualified from holding any office of honor, profit or trust under the United States.

"This section shall not prevent any officer or member of the Armed Forces from exercising the right of suffrage in any district to which he may belong, if otherwise qualified according to the laws of the State of such district."

Another Reconstruction Era statute forbids the use of military troops as a posse comitatus:

18 U. S. C. § 1385:

"Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both."

Finally, there are two specialized statutes. It was thought necessary to pass an Act of Congress to give the armed services some limited power to control prostitution near military bases, and an Act of Congress was required to enable a member of the Joint Chiefs of Staff to testify before Congress:

18 U. S. C. § 1384:

"Within such reasonable distance of any military or naval camp, station, fort, post, yard, base, cantonment, training or mobilization place as the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or any two or all of them shall determine to be needful to the efficiency, health, and welfare of the Army, the Navy, or the Air Force, and shall designate and publish in general orders or bulletins, whoever engages in prostitution or aids or abets prostitution or procures or solicits for purposes of prostitution, or keeps or sets up a house of ill fame, brothel, or bawdy house, or receives any person for purposes of lewdness, assignation, or prostitution into any vehicle, conveyance, place, structure, or building, or permits any person to remain for

the purpose of lewdness, assignation, or prostitution in any vehicle, conveyance, place, structure, or building or leases or rents or contracts to lease or rent any vehicle, conveyance, place, structure or building, or part thereof, knowing or with good reason to know that it is intended to be used for any of the purposes herein prohibited shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"The Secretaries of the Army, Navy, and Air Force and the Federal Security Administrator shall take such steps as they deem necessary to suppress and prevent such violations thereof, and shall accept the cooperation of the authorities of States and their counties, districts, and other political subdivisions in carrying out the purpose of this section.

"This section shall not be construed as conferring on the personnel of the Departments of the Army, Navy, or Air Force or the Federal Security Agency any authority to make criminal investigations, searches, seizures, or arrests of civilians charged with violations of this section."

10 U. S. C. § 141 (e):

"After first informing the Secretary of Defense, a member of the Joint Chiefs of Staff may make such recommendations to Congress relating to the Department of Defense as he may consider appropriate."

APPENDIX II TO OPINION OF DOUGLAS, J., DISSENTING

Walter Lippmann gave the following account of his conversation with Churchill:

> "The President's bringing Gen. Westmoreland home in order to explain the war reminds me of an instructive afternoon spent during the Second World War. The country and the Congress were divided on the question of whether to strike first against

Hitler or first against Japan. Churchill and Roosevelt had agreed on the policy of Hitler first. But there were large and powerful groups in the country, many of them former isolationists in the sense that they were anti-European, who wanted to concentrate American forces on winning the war against Japan. Even the American chiefs of staff were divided on this question of high strategy.

"Churchill had come to Washington, accompanied by the British chiefs of staff, to work out with President Roosevelt and the Administration the general plan of the global war. One morning I had a telephone call from Sen. Austin, who was a strong believer in the Churchill-Roosevelt line. He said in effect, 'I know you are seeing the Prime Minister this afternoon and I wish you would ask him to tell his chiefs of staff to come to Congress and testify in favor of our strategical policy.' Quite innocently I said I would do this, and when Churchill received me that afternoon I began by saying that I had a message from Sen. Austin. 'Would the Prime Minister instruct his chiefs of staff to go to the Senate Foreign Relations Committee . . . .' I never finished the message. For the old lion let out a roar demanding to know why I was so ignorant of the British way of doing things that I could dare to suggest that a British general should address a parliamentary body.

"As I remember it, what he said was, 'I am the Minister of Defense and I, not the generals, will state the policy of His Majesty's government.'

"No one who ever aroused the wrath of Churchill is likely to forget it. I certainly have not forgotten it. I learned an indelible lesson about one of the elementary principles of democratic government. And therefore, I take a very sour view of a field

commander being brought home by the President to educate the Congress and the American people."

Our military added political departments to their staffs. A Deputy Chief of Naval Operations, Military Policy Division, was first established in the Department of the Navy by President Truman in 1945. In the Office of Secretary of Defense that was done by President Truman in 1947, the appointee eventually becoming Assistant Secretary for International Security Affairs. A like office was established in 1961 in the Department of the Army by President Kennedy and another for the Air Force in 1957 by President Eisenhower. Thus, when the Pentagon entered a Washington, D. C., conference, its four "Secretaries of State" faced the real Secretary of State and more frequently than not talked or stared him down. The Pentagon's "Secretaries of State" usually spoke in unison; they were clear and decisive with no ifs, ands, or buts, and in policy conferences usually carried the day.

By 1968 the Pentagon was spending $34 million a year on non-military social and behavioral science research both at home and abroad. One related to "witchcraft, sorcery, magic, and other psychological phenomena" in the Congo. Another concerned the "political influence of university students in Latin America." Other projects related to the skill of Korean women as divers, snake venoms in the Middle East, and the like. Research projects were going on for the Pentagon in 40 countries in sociology, psychology and behavioral sciences.

The Pentagon became so powerful that no President would dare crack down on it and try to regulate it.

The military approach to world affairs conditioned our thinking and our planning after World War II.

We did not realize that to millions of these people there was no difference between a Communist dictatorship

and the dictatorship under which they presently lived. We did not realize that in some regions of Asia it was the Communist party that identified itself with the so-called reform programs, the other parties being mere instruments for keeping a ruling class in power. We did not realize that, in the eyes of millions of illiterates, the choice between democracy and communism was not the critical choice it would be for us.

We talked about "saving democracy." But the real question in Asia, the Middle East, Africa, and Latin America was whether democracy would ever be born.

We forgot that democracy in most lands is an empty word. We asked illiterate people living at the subsistence level to furnish staging grounds for a military operation whose outcome, in their eyes, had no relation to their own welfare. Those who rejected our overtures must be communists, we said. Those who did not approve our military plans must be secretly aligning with Russia, we thought.

So it was that in underdeveloped areas we became identified not with ideas of freedom, but with bombs, planes, and tanks. We thought less and less in terms of defeating communism with programs of political action, more and more in terms of defeating communism with military might. Our foreign aid mounted; but nearly 70% of it was military aid.

Our fears mounted as the cold war increased in intensity. These fears had many manifestations. The communist threat inside the country was magnified and exalted far beyond its realities. Irresponsible talk fanned the flames. Accusations were loosely made. Character assassinations were common. Suspicion took the place of goodwill. We needed to debate with impunity and explore to the edges of problems. We needed to search to the horizon for answers to perplexing problems. We needed confidence in each other. But in the

40's, 50's, and 60's suspicions grew. Innocent acts became telltale marks of disloyalty. The coincidence that an idea paralleled Soviet Russia's policy for a moment of time settled an aura of doubt around a person. The Intervention of the General, Washington Post, Apr. 27, 1967, Sec. A, p. 21, col. 1.

APPENDIX III TO OPINION OF DOUGLAS, J., DISSENTING

Alexander I. Solzhenitsyn, the noted Soviet author, made the following statement March 30, 1972, concerning surveillance of him and his family (reported in the Washington Post, Apr. 3, 1972):

"A kind of forbidden, contaminated zone has been created around my family, and to this day, there are people in Ryazan [where Solzhenitsyn used to live] who were dismissed from their jobs for having visited my house a few years ago. A corresponding member of the Academy of Sciences, T. Timofeyev, who is director of a Moscow institute, became so scared when he found out that a mathematician working under him was my wife that he dismissed her with unseemly haste, although this was just after she had given birth and contrary to all laws . . .

"It happens that an informant [for his new book on the history of prerevolutionary Russia] may meet with me. We work an hour or two and as soon as he leaves my house, he will be closely followed, as if he were a state criminal, and they will investigate his background, and then go on to find out who this man meets, and then, in turn, who that [next] person is meeting.

"Of course they cannot do this with everyone. The state security people have their schedule, and their own profound reasoning. On some days, there is no surveillance at all, or only superficial surveillance. On other days, they hang around, for example when Heinrich Boll

came to see me [he is a German writer who recently visited Moscow]. They will put a car in front of each of the two approaches [to the courtyard of the apartment house where he stays in Moscow] with three men in each car—and they don't work only one shift. Then off they go after my visitors, or they trail people who leave on foot.

"And if you consider that they listen around the clock to telephone conversations and conversations in my home, they analyze recording tapes and all correspondence, and then collect and compare all these data in some vast premises—and these people are not underlings—you cannot but be amazed that so many idlers in the prime of life and strength, who could be better occupied with productive work for the benefit of the fatherland, are busy with my friends and me, and keep inventing enemies."

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

The Court of Appeals held that a justiciable controversy exists and that respondents have stated a claim upon which relief could be granted. 144 U. S. App. D. C. 72, 83, 444 F. 2d 947, 958 (1971). I agree with Judge Wilkey, writing for the Court of Appeals, that this conclusion is compelled for the following reasons stated by him:

> "[Respondents] contend that the *present existence of this system* of gathering and distributing information, allegedly far beyond the mission requirements of the Army, constitutes an impermissible burden on [respondents] and other persons similarly situated which exercises a *present inhibiting effect* on their full expression and utilization of their First Amendment rights of free speech, etc. The baleful effect, if there is one, is thus a present

inhibition of lawful behavior and of First Amendment rights.

"Under this view of [respondents'] allegations, under justiciability standards it is the operation of the system itself which is the breach of the Army's duty toward [respondents] and other civilians. The case is therefore ripe for adjudication. Because the evil alleged in the Army intelligence system is that of overbreadth, *i. e.*, the collection of information not reasonably relevant to the Army's mission to suppress civil disorder, and because there is no indication that a better opportunity will later arise to test the constitutionality of the Army's action, the issue can be considered justiciable at this time." *Id.*, at 79–81, 444 F. 2d, at 954–956 (emphasis in original) (footnotes omitted).

"To the extent that the Army's argument against justiciability here includes the claim that [respondents] lack standing to bring this action, we cannot agree. If the Army's system does indeed derogate First Amendment values, the [respondents] are persons who are sufficiently affected to permit their complaint to be heard. The record shows that most if not all of the [respondents] and/or the organizations of which they are members have been the subject of Army surveillance reports and their names have appeared in the Army's records. Since this is precisely the injury of which [respondents] complain, they have standing to seek redress for that alleged injury in court and will provide the necessary adversary interest that is required by the standing doctrine, on the issue of whether the actions complained of do in fact inhibit the exercise of First Amendment rights. Nor should the fact that

these particular persons are sufficiently uninhibited to bring this suit be any ground for objecting to their standing." *Id.*, at 79 n. 17, 444 F. 2d, at 954 n. 17.

Respondents may or may not be able to prove the case they allege. But I agree with the Court of Appeals that they are entitled to try. I would therefore affirm the remand to the District Court for a trial and determination of the issues specified by the Court of Appeals.

GELBARD ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71–110. Argued March 27, 1972—Decided June 26, 1972*

Where a grand jury witness is adjudicated in civil contempt under 28 U. S. C. § 1826 (a) for refusing "without just cause shown to comply with an order of the court to testify," the witness may invoke as a defense 18 U. S. C. § 2515, which directs that "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any . . . proceeding in or before any . . . grand jury . . . ," since a showing that the interrogation would be based upon the illegal interception of the witness' communications would constitute the "just cause" that precludes a finding of contempt. Pp. 46–61.

No. 71–110, 443 F. 2d 837, reversed and remanded; No. 71–263, 450 F. 2d 199 and 450 F. 2d 231, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, WHITE, and MARSHALL, JJ., joined. DOUGLAS, J., *post*, p. 62, and WHITE, J., *post*, p. 69, filed concurring opinions. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN and POWELL, JJ., joined, *post*, p. 71.

Michael E. Tigar argued the cause for petitioners in No. 71–110. With him on the brief was *Burton Marks*. *Mr. Marks* filed a brief for petitioner Gelbard in No. 71–110.

Deputy Solicitor General Friedman argued the cause for the United States in both cases. On the brief in No. 71–110 were *Solicitor General Griswold*, *Assistant Attorney General Petersen*, *Allan A. Tuttle*, and *Beatrice Rosenberg*. On the brief in No. 71–263 were *Solicitor*

*Together with No. 71–263, *United States* v. *Egan et al.*, on certiorari to the United States Court of Appeals for the Third Circuit.

General Griswold, Assistant Attorney General Mardian, Mr. Tuttle, and *Robert L. Keuch.*

Jack J. Levine argued the cause *pro hac vice* for respondent Egan in No. 71–263. With him on the brief was *Charles R. Nesson. Bernard L. Segal* filed a brief for respondent Walsh in No. 71–263.

Melvin L. Wulf, Sanford Jay Rosen, Thomas Harvey, and *Laurence R. Sperber* filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal in No. 71–110 and affirmance in No. 71–263. *Frank G. Carrington, Jr.,* and *Alan S. Ganz* filed a brief for Americans for Effective Law Enforcement, Inc., as *amicus curiae* urging reversal in No. 71–263.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

These cases present challenges to the validity of adjudications of civil contempt, pursuant to 28 U. S. C. § 1826 (a),[1] of witnesses before federal grand juries

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[1] Section 1826 (a) provides:

"Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

"(1) the court proceeding, or

"(2) the term of the grand jury, including extensions,

"before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months."

This provision was enacted as part of the Organized Crime Control Act of 1970. It was intended to codify the existing practice of the federal courts. S. Rep. No. 91–617, pp. 33, 56–57, 148–149 (1969);

who refused to comply with court orders to testify. The refusals were defended upon the ground that interrogation was to be based upon information obtained from the witnesses' communications, allegedly intercepted by federal agents by means of illegal wiretapping and electronic surveillance. A provision of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211, as amended, 18 U. S. C. §§ 2510–2520, directs that "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any . . . proceeding in or before any . . . grand jury . . . if the disclosure of that information would be in violation of this chapter." 18 U. S. C. § 2515.[2] The question presented is whether grand jury witnesses, in proceedings under 28 U. S. C. § 1826 (a), are entitled to invoke this prohibition of § 2515 as a defense to contempt charges brought against them for refusing to testify. In No. 71–110, the Court of Appeals for the Ninth Circuit held that they are not entitled to do so. *United States* v. *Gelbard*, 443 F. 2d 837 (1971). In No. 71–263, the Court of Appeals for the Third Circuit, *en banc*, reached the contrary conclusion. *In re Grand Jury Proceedings, Harrisburg, Pennsylvania (Egan)*, 450

H. R. Rep. No. 91–1549, pp. 33, 46 (1970); see *Shillitani* v. *United States*, 384 U. S. 364 (1966).

[2] Section 2515 provides in full:

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

F. 2d 199 (1971); *In re Grand Jury Proceedings, Harrisburg, Pennsylvania (Walsh)*, 450 F. 2d 231 (1971). We granted certiorari. 404 U. S. 990 (1971).[3] We disagree with the Court of Appeals for the Ninth Circuit and agree with the Court of Appeals for the Third Circuit.

No. 71–110. A federal district judge approved wiretaps by federal agents of the telephones of Perry Paul, an alleged bookmaker, and Jerome Zarowitz, a former executive of a Las Vegas casino. In the course of those taps, the agents overheard conversations between Paul and petitioner Gelbard and between Zarowitz and petitioner Parnas. Petitioners were subsequently called before a federal grand jury convened in Los Angeles to investigate possible violations of federal gambling laws. The Government asserted that petitioners would be questioned about third parties and that the questions would be based upon petitioners' intercepted telephone conversations. Petitioners appeared before the grand jury, but declined to answer any questions based upon their intercepted conversations until they were afforded an opportunity to challenge the legality of the interceptions. Following a hearing, the United States District Court for the Central District of California found petitioners in contempt and, pursuant to 28

[3] The Third Circuit followed *Egan* in *In re Grand Jury Investigation (Maratea)*, 444 F. 2d 499 (1971) (*en banc*). The District of Columbia Circuit has aligned itself with the Third, see *In re Evans*, 146 U. S. App. D. C. 310, 452 F. 2d 1239 (1971), while the Ninth has continued to follow *Gelbard*, see *Bacon* v. *United States*, 446 F. 2d 667 (1971); *Olsen* v. *United States*, 446 F. 2d 912 (1971); *In re Russo*, 448 F. 2d 369 (1971); *Reed* v. *United States*, 448 F. 2d 1276 (1971); *United States* v. *Reynolds*, 449 F. 2d 1347 (1971). The First and Fifth Circuits have also adverted to the question. *United States* v. *Doe (In re Marx)*, 451 F. 2d 466 (CA1 1971); *United States* v. *Doe (In re Popkin)*, 460 F. 2d 328 (CA1 1972); *Dudley* v. *United States*, 427 F. 2d 1140 (CA5 1970). See also *United States ex rel. Rosado* v. *Flood*, 394 F. 2d 139 (CA2 1968); *Carter* v. *United States*, 417 F. 2d 384 (CA9 1969).

U. S. C. § 1826 (a), committed them to custody for the life of the grand jury or until they answered the questions.

No. 71–263. Respondents Egan and Walsh were called before a federal grand jury convened in Harrisburg, Pennsylvania, to investigate, among other possible crimes, an alleged plot to kidnap a Government official. Pursuant to 18 U. S. C. § 2514, both respondents were granted transactional immunity in return for their testimony. Respondents appeared before the grand jury, but refused to answer questions on the ground, among others, that the questions were based upon information overheard from respondents by means of the Government's illegal wiretapping and electronic surveillance. The Government did not reply to respondents' allegations.[4] Following a hearing, the United States District Court for the Middle District of Pennsylvania found respondents in contempt, and they were also committed to custody pursuant to 28 U. S. C. § 1826 (a).

Section 1826 (a) expressly limits the adjudication of civil contempt to the case of a grand jury witness who "refuses without just cause shown to comply with an order of the court to testify." Our inquiry, then, is whether a showing that interrogation would be based upon the illegal interception of the witness' communications constitutes a showing of "just cause" that precludes a finding of contempt. The answer turns on the construction of Title III of the Omnibus Crime Control Act.[5]

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[4] See n. 23, *infra*.

[5] In view of our disposition of these cases, we do not reach any of the constitutional issues tendered as to the right of a grand jury witness to rely upon the Fourth Amendment as a basis for refusing to answer questions. We also note that the constitutionality of Title III is not challenged in these cases.

I

In Title III, Congress enacted a comprehensive scheme for the regulation of wiretapping and electronic surveillance. See *United States* v. *United States District Court*, 407 U. S. 297, 301–306. Title III authorizes the interception of private wire and oral communications, but only when law enforcement officials are investigating specified serious crimes and receive prior judicial approval, an approval that may not be given except upon compliance with stringent conditions. 18 U. S. C. §§ 2516, 2518 (1)–(8). If a wire or oral communication is intercepted in accordance with the provisions of Title III, the contents of the communication may be disclosed and used under certain circumstances. 18 U. S. C. § 2517. Except as expressly authorized in Title III, however, all interceptions of wire and oral communications are flatly prohibited. Unauthorized interceptions and the disclosure or use of information obtained through unauthorized interceptions are crimes, 18 U. S. C. § 2511 (1), and the victim of such interception, disclosure, or use is entitled to recover civil damages, 18 U. S. C. § 2520. Title III also bars the use as evidence before official bodies of the contents and fruits of illegal interceptions, 18 U. S. C. § 2515, and provides procedures for moving to suppress such evidence in various proceedings, 18 U. S. C. § 2518 (9)–(10).

The witnesses in these cases were held in contempt for disobeying court orders by refusing to produce evidence—their testimony—before grand juries. Consequently, their primary contention is that § 2515, the evidentiary prohibition of Title III, afforded them a defense to the contempt charges. In addressing that contention, we must assume, in the present posture of

these cases, that the Government has intercepted communications of the witnesses and that the testimony the Government seeks from them would be, within the meaning of § 2515, "evidence derived" from the intercepted communications. We must also assume that the communications were not intercepted in accordance with the specified procedures and thus that the witnesses' potential testimony would be "disclosure" in violation of Title III. See 18 U. S. C. §§ 2511 (1), 2517 (3). In short, we proceed on the premise that § 2515 prohibits the presentation to grand juries of the compelled testimony of these witnesses.

The narrow question, then, is whether under these circumstances the witnesses may invoke the prohibition of § 2515 as a defense to contempt charges brought on the basis of their refusal to obey court orders to testify. We think they may.

The unequivocal language of § 2515 expresses the fundamental policy adopted by Congress on the subject of wiretapping and electronic surveillance. As the congressional findings for Title III make plain, that policy is strictly to limit the employment of those techniques of acquiring information:

> "To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurances that the interception is justified and that the information

obtained thereby will not be misused." § 801 (d), 82 Stat. 211.[6]

The Senate committee report that accompanied Title III underscores the congressional policy:

> "Title III has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized. To assure the privacy of oral and wire communications, title III prohibits all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officers engaged in the investigation or prevention of specified types of serious crimes, and only after authorization of a court order obtained after a showing and finding of probable cause." S. Rep. No. 1097, 90th Cong., 2d Sess., 66 (1968).

Hence, although Title III authorizes invasions of individual privacy under certain circumstances, the protection of privacy was an overriding congressional concern.[7] Indeed, the congressional findings articulate

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[6] "Paragraph (d) recognizes the responsible part that the judiciary must play in supervising the interception of wire or oral communications in order that the privacy of innocent persons may be protected: . . . the interception or use of wire or oral communications should only be on court order. Because of the importance of privacy, such interceptions should further be limited to major offenses and care must be taken to insure that no misuse is made of any information obtained." S. Rep. No. 1097, 90th Cong., 2d Sess., 89 (1968).

[7] In stating the problem addressed by Congress in Title III, the Senate report noted that "[b]oth proponents and opponents of wiretapping and electronic surveillance agree that the present state of the law in this area is extremely unsatisfactory and that the Congress should act to clarify the resulting confusion." *Id.*, at

clearly the intent to utilize the evidentiary prohibition of § 2515 to enforce the limitations imposed by Title III upon wiretapping and electronic surveillance:

> "In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and *the use of the contents thereof in evidence in courts and administrative proceedings.*" § 801 (b), 82 Stat. 211 (emphasis added).[8]

And the Senate report, like the congressional findings, specifically addressed itself to the enforcement, by means

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67. The report agreed: "It would be, in short, difficult to devise a body of law from the point of view of privacy or justice more totally unsatisfactory in its consequences." *Id.*, at 69. The report then stressed that Title III would provide the protection for privacy lacking under the prior law:

"The need for comprehensive, fair and effective reform setting uniform standards is obvious. *New protections for privacy must be enacted.* Guidance and supervision must be given to State and Federal law enforcement officers. This can only be accomplished through national legislation. This the subcommittee proposes." *Ibid.* (emphasis added).

[8] "Paragraph (b) recognizes that to protect the privacy of wire and oral communications, to protect the integrity of court and administrative proceeding[s] and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire or oral communications may be authorized. It also finds that all unauthorized interception of such communications should be prohibited, as well as *the use of the contents of unauthorized*

of § 2515, of the limitations upon invasions of individual privacy:

> "Virtually all concede that the use of wiretapping or electronic surveillance techniques by private unauthorized hands has little justification where communications are intercepted without the consent of one of the participants. No one quarrels with the proposition that the unauthorized use of these techniques by law enforcement agents should be prohibited. . . . Only by striking at all aspects of the problem can privacy be adequately protected. The prohibition, too, must be enforced with all appropriate sanctions. Criminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provision must be made for civil recourse for damages. *The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings.* Each of these objectives is sought by the proposed legislation." S. Rep. No. 1097, *supra*, at 69 (emphasis added).

Section 2515 is thus central to the legislative scheme. Its importance as a protection for "the victim of an unlawful invasion of privacy" could not be more clear.[9]

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interceptions as evidence in courts and administrative hearings." Id., at 89 (emphasis added).

[9] "Section 2515 of the new chapter imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter. It provides that intercepted wire or oral communications or evidence derived therefrom may not be received in evidence in any proceeding before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision of a State, where the disclosure of that information would be in violation of this chapter. . . . [I]t is not limited to criminal proceedings. Such a suppression rule is necessary and proper to protect privacy. The provision thus

The purposes of § 2515 and Title III as a whole would be subverted were the plain command of § 2515 ignored when the victim of an illegal interception is called as a witness before a grand jury and asked questions based upon that interception. Moreover, § 2515 serves not only to protect the privacy of communications,[10] but also to ensure that the courts do not become partners to illegal conduct: the evidentiary prohibition was enacted also "to protect the integrity of court and administrative proceedings." Consequently, to order a grand jury witness, on pain of imprisonment, to disclose evidence that § 2515 bars in unequivocal terms is both to thwart the congressional objective of protecting individual privacy by excluding such evidence and to entangle the courts in the illegal acts of Government agents.

In sum, Congress simply cannot be understood to have sanctioned orders to produce evidence excluded from grand jury proceedings by § 2515. Contrary to the Government's assertion that the invasion of privacy is over

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forms an integral part of the system of limitations designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications." *Id.*, at 96 (citations omitted).

[10] Congressional concern with the protection of the privacy of communications is evident also in the specification of what is to be protected. "The proposed legislation is intended to protect the privacy of the communication itself . . . ." *Id.*, at 90. As defined in Title III, " 'contents,' when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication." 18 U. S. C. § 2510 (8). The definition thus "include[s] all aspects of the communication itself. No aspect, including the identity of the parties, the substance of the communication between them, or the fact of the communication itself, is excluded. The privacy of the communication to be protected is intended to be comprehensive." S. Rep. No. 1097, *supra*, at 91.

and done with, to compel the testimony of these witnesses compounds the statutorily proscribed invasion of their privacy by adding to the injury of the interception the insult of compelled disclosure. And, of course, Title III makes illegal not only unauthorized interceptions, but also the disclosure and use of information obtained through such interceptions. 18 U. S. C. § 2511 (1); see 18 U. S. C. § 2520. Hence, if the prohibition of § 2515 is not available as a defense to the contempt charge, disclosure through compelled testimony makes the witness the victim, once again, of a federal crime. Finally, recognition of § 2515 as a defense "relieves judges of the anomalous duty of finding a person in civil contempt for failing to cooperate with the prosecutor in a course of conduct which, if pursued unchecked, could subject the prosecutor himself to heavy civil and criminal penalties." *In re Grand Jury Proceedings, Harrisburg, Pennsylvania (Egan)*, 450 F. 2d, at 220 (Rosenn, J., concurring). "And for a court, on petition of the executive department, to sentence a witness, who is herself the victim of the illegal wiretapping, to jail for refusal to participate in the exploitation of that crime in violation of the explicit command of Section 2515 is to stand our whole system of criminal justice on its head." *In re Evans*, 146 U. S. App. D. C. 310, 323, 452 F. 2d 1239, 1252 (1971) (Wright, J., concurring).

II

Our conclusion that § 2515 is an available defense to the contempt charge finds additional support in 18 U. S. C. § 3504, enacted as part of the Organized Crime Control Act of 1970, 84 Stat. 935. Section 3504 is explicit confirmation that Congress intended that grand jury witnesses, in reliance upon the prohibition of § 2515, might refuse to answer questions based upon the illegal interception of their communications.

Section 3504 provides:

> "(a) In any . . . proceeding in or before any . . . grand jury . . . .
>
> "(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act."

Under § 3504 (a)(2), disclosure of information relating to the claim of inadmissibility is not mandatory if the "unlawful act" took place before June 19, 1968, the effective date of Title III. Under § 3504 (a)(3), there is a five-year limitation upon the consideration of a claim of inadmissibility based upon "the exploitation of an unlawful act" that took place before June 19, 1968. Section 3504 (b), by reference to Title III, defines an "unlawful act" as one involving illegal wiretapping or electronic surveillance.[11]

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[11] Section 3504 provides in full:

"(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—

"(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

"(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968, or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility; and

"(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if

Section 3504, then, establishes procedures to be followed "upon a claim by a party aggrieved that evidence is inadmissible because" of an illegal interception. And § 3504 tracks § 2515 in its application to grand jury proceedings. Indeed, "[t]he language used in defining the types of proceedings, types of forums, and jurisdictions in which section 3504 is applicable was taken from 18 U. S. C. § 2515." S. Rep. No. 91–617, p. 154 (1969).[12] In the application of § 3504 to "any . . . proceeding in or before any . . . grand jury," "a party aggrieved" can only be a witness, for there is no other "party" to a grand jury proceeding. Moreover, a "claim . . . that evidence is inadmissible" can only be a claim that the witness' potential testimony is inadmissible. Hence, § 3504, by contemplating "a claim by a party aggrieved that evidence is inadmissible because" of an illegal interception, necessarily recognizes that grand jury witnesses may rely upon the prohibition of § 2515 in claiming that the evidence sought from them is inadmissible in the grand jury proceedings. Upon such a claim by a grand jury witness, the Government, as "the opponent of the claim," is required under § 3504 (a)(1) to

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such event occurred more than five years after such allegedly unlawful act.

"(b) As used in this section 'unlawful act' means any act [involving] the use of any electronic, mechanical, or other device (as defined in section 2510 (5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto."

No question as to the constitutionality of § 3504 is raised in these cases.

[12] "The only exception is that section 350 [4] omits legislative committees." S. Rep. No. 91–617, p. 154 (1969). In addition, the House amended § 3504, as passed by the Senate, so that, unlike § 2515, it "applies only to trials and other proceedings conducted under authority of the United States." H. R. Rep. No. 91–1549, p. 51 (1970).

"affirm or deny the occurrence of the alleged" illegal interception. Section 3504 thus confirms that Congress meant that grand jury witnesses might defend contempt charges by invoking the prohibition of § 2515 against the compelled disclosure of evidence obtained in violation of Title III.

The Government urges, however, that the procedures prescribed in § 3504 are limited in application to claims of inadmissibility based upon illegal interceptions that took place before June 19, 1968, and that § 3504 cannot, therefore, provide support for a construction of § 2515. We disagree. While subsections (a)(2) and (a)(3) apply only when the illegal interception took place before June 19, 1968, it is clear both from the face of § 3504 [13] and from its legislative history that subsection (a)(1), imposing the duty upon "the opponent of the claim" to "affirm or deny the occurrence of the alleged" illegal interception, is not similarly limited.

The omission of the June 19, 1968, date from subsection (a)(1) was not inadvertent. Subsection (a)(1) was not in the original Senate bill, although the bill did contain counterparts of present subsections (a)(2) and (a)(3) without the June 19, 1968, or any other date limitation.[14] See Hearings before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary on S. 30 et al., 91st Cong., 1st Sess., 102–

[13] The references to June 19, 1968, appear only in subsections (a)(2) and (a)(3). Subsection (a)(1) does not similarly limit the term "unlawful act" with the phrase "occurring prior to June 19, 1968." See n. 11, *supra*. It is thus plain on the face of § 3504 that Congress did not make the duty imposed by subsection (a)(1) dependent upon the date of the alleged illegal interception.

[14] The Senate passed § 3504 in a form that, so far as is pertinent to the issue before us, differed from the section as finally enacted only in that subsections (a)(2) and (a)(3) in the Senate version were not limited in application to illegal interceptions that took place before June 19, 1968. See S. Rep. No. 91–617, pp. 15, 70 (1969).

105 (1969). Subsection (a)(1) was added at the suggestion of the Department of Justice. At that time the Department followed the practice of searching Government files for information about wiretaps and eavesdropping. The Department advised the Senate Judiciary Committee that while it had been "conduct[ing] such examinations as a matter of policy even in cases where no motion ha[d] been filed . . . defendants should be assured such an examination by a specific requirement of law rather than hav[ing] to rely upon the continued viability of a current policy." *Id.*, at 553. The Senate report on § 3504 explained that "since [subsection (a)(1)] requires a pending claim as a predicate to disclosure, it sets aside the present wasteful practice of the Department of Justice in searching files without a motion from a defendant." S. Rep. No. 91-617, p. 154 (1969).

The reason assigned in the Senate for enacting subsection (a)(1) was thus as applicable to post- as it was to pre-June 19, 1968, interceptions. The same was true of the House. There subsection (a)(1) was supported on the ground that it would be beneficial to the victims of illegal interceptions. Senator McClellan, for example, who testified before the House Subcommittee, indicated that subsection (a)(1) "places upon the Government an affirmative duty to answer a claim that evidence is inadmissible because of unlawful investigative conduct." "The first requirement [of § 3504], that the Government admit or deny the occurrence of the alleged invasion of the defendant's rights, actually places or codifies a burden upon the Government, rather than the defendant." Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on S. 30 et al., 91st Cong., 2d Sess., 84, 104 (1970). Other witnesses thought the provision unnecessary.[15] Indeed, one organization submitted

[15] "[Subsection (a)(1)] provides that in an attack upon the admissibility of evidence because it is the product of an unlawful

a report that disapproved subsection (a)(1) on the ground that the Government should admit illegalities without a prior claim. *Id.*, at 562 (Section of Criminal Law of the American Bar Association). It is also significant that congressional questioning of a representative of the Department of Justice at the hearings was directed to the Department's views on the insertion of a date limitation only in subsections (a)(2) and (a)(3). *Id.*, at 659; see the Department's written response, *id.*, at 675–676.

The June 19, 1968, date was inserted in subsections (a)(2) and (a)(3) after the conclusion of the House hearings. It is apparent from the House report that only subsections (a)(2) and (a)(3) of the Senate version were to be limited by the June 19, 1968, date and that subsection (a)(1) was to be operative without regard to when the alleged illegal interception may have taken place:

> "Paragraph (1) provides that upon a claim by an aggrieved party that evidence is inadmissible because it is the primary product of an unlawful act, or because it was obtained by the exploitation of an unlawful act, the opponent of the claim must affirm or deny the occurrence of the alleged unlawful act. Under this provision, upon a charge by the defendant with standing to challenge the alleged unlawful conduct, the Government would be required to affirm or deny that an unlawful act

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act . . . , the opponent of such claim shall affirm or deny the alleged unlawful act . . . . In this respect [§ 3504] is unnecessary." Hearings before Subcommittee No. 5 of the House Judiciary Committee on S. 30 et al., 91st Cong., 2d Sess., 399 (1970) (report of the Committee on Federal Legislation of the New York County Lawyers' Association). "That is the law now by Supreme Court decision. [Subsection (a)(1)] adds nothing to what exists right now." *Id.*, at 513 (testimony of Lawrence Speiser, representing the American Civil Liberties Union).

> involving electronic surveillance had in fact occurred. If such an unlawful act had in fact occurred, paragraph (2), below, will govern disclosure of the contents of the electronic surveillance records or transcripts to the defendant and his counsel, unless paragraph (3) applies." H. R. Rep. No. 91–1549, p. 51 (1970).

This explanation demonstrates that "the opponent of the claim" [16] has a duty to "affirm or deny" whenever "a party aggrieved" "claim[s] . . . that evidence is inadmissible because it is" derived from an illegal interception. The date June 19, 1968, becomes relevant only after it is determined that an illegal interception took place and an issue thus arises as to disclosure of information bearing on the claim.[17]

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[16] Congress, of course, was primarily concerned with "certain evidentiary problems created by electronic surveillance conducted by the Government prior to the enactment of [Title III] on June 19, 1968, which provided statutory authority for obtaining surveillance warrants in certain types of criminal investigations (18 U. S. C. 2516)." H. R. Rep. No. 91–1549, p. 50 (1970). As the Senate report noted, however, § 3504 applies to "[c]ivil as well as criminal proceedings . . . , regardless of whether a government or governmental body or officer is or is not a party or witness." S. Rep. No. 91–617, p. 154 (1969). Moreover, "unlawful acts," as defined in § 3504 (b), may be "acts of private citizens, as well as acts of Federal or State officials." *Ibid.*

[17] "Under paragraph (2) disclosure of the information shall be required to be made to a defendant who has demonstrated the illegality of the electronic surveillance (occurring prior to June 19, 1968) and his standing where such information is or 'may be' relevant to a claim of inadmissibility. In cases where the electronic surveillance occurred on or after June 19, 1968, disclosure is mandatory where illegality and standing are demonstrated. The provision thus alters the procedure announced in *Alderman* v. *United States*, 394 U. S. 165 [(1969)] with respect to 'unlawful acts' committed prior to June 19, 1968." H. R. Rep. No. 91–1549, p. 51 (1970).

III

The Government argues, finally, that while § 2515 could be construed to allow a grand jury witness to invoke its prohibition as a defense to a contempt charge, "[i]f this section were the only relevant portion of [Title III]," Brief for the United States in No. 71–263, p. 19, proceedings before grand juries are omitted from another provision of Title III, § 2518 (10)(a), that authorizes "[a]ny aggrieved person," [18] in specified types of proceedings, to "move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom." [19] But it does not follow from the asserted omission of grand jury proceedings from the suppression provision that grand jury witnesses cannot invoke § 2515 as a defense in a contempt proceeding under 28 U. S. C. § 1826 (a).[20] The congressional concern with the appli-

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[18] An "aggrieved person," for purposes of § 2518 (10)(a), is "a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed." 18 U. S. C. § 2510 (11); see S. Rep. No. 1097, 90th Cong., 2d Sess., 91, 106 (1968).

[19] Section 2518 (10) provides in pertinent part:

"(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom . . . ."

While on its face § 2518 (10)(a) applies to grand jury proceedings, when compared with the list of proceedings in § 2515, see n. 2, *supra*, it appears that "grand jury" was omitted from the list in § 2518 (10)(a).

[20] "Because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself. . . . It is the intent of the provision only that when a motion to suppress is granted in another context, its scope may include use in a future

cability of § 2518 (10)(a) in grand jury proceedings, so far as it is discernible from the Senate report, was apparently that defendants and potential defendants might be able to utilize suppression motions to impede the issuance of indictments: "Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual. [*United States* v. *Blue*, 384 U. S. 251 (1966).] There is no intent to change this general rule." S. Rep. No. 1097, 90th Cong., 2d Sess., 106 (1968). The "general rule," as illustrated in *Blue*, is that a defendant is not entitled to have his indictment dismissed before trial simply because the Government "acquire[d] incriminating evidence in violation of the [law]," even if the "tainted evidence was presented to the grand jury." 384 U. S., at 255 and n. 3; see *Lawn* v. *United States*, 355 U. S. 339 (1958); *Costello* v. *United States*, 350 U. S. 359 (1956). But that rule has nothing whatever to do with the situation of a grand jury witness who has refused to testify and attempts to defend a subsequent charge of contempt. Hence, we cannot agree that the Senate report expressed the view that a grand jury witness would be foreclosed from raising the § 2515 defense in a contempt proceeding under § 1826 (a).

Furthermore, grand jury witnesses do not normally discover whether they may refuse to answer questions by filing motions to suppress their potential testimony. The usual procedure is, upon the Government's motion, to have a court order a grand jury witness to testify upon penalty of contempt for noncompliance. Section 1826 (a) embodies that traditional procedure. The asserted omission of grand jury proceedings from § 2518

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grand jury proceeding." S. Rep. No. 1097, 90th Cong., 2d Sess., 106 (1968). This assertion is not ambiguous, for motions to suppress evidence to be presented to a grand jury would presumably be made in court.

(10)(a) may well reflect congressional acceptance of that procedure as adequate in these cases. Consequently, we cannot suppose that Congress, by providing procedures for suppression motions, intended to deprive grand jury witnesses of the § 2515 defense that would otherwise be available to them. Although the Government points to statements in the Senate report to the effect that § 2518 (10)(a) "limits" § 2515, we read those statements to mean that suppression motions, as a method of enforcing the prohibition of § 2515, must be made in accordance with the restrictions upon forums, procedures, and grounds specified in § 2518 (10)(a).[21]

The judgment of the Court of Appeals for the Ninth Circuit in No. 71–110 is reversed, and the case is remanded for further proceedings consistent with this opinion.[22] The judgment of the Court of Appeals for the Third Circuit in No. 71–263 is affirmed.[23]

It is so ordered.

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[21] "This definition [§ 2510 (11)] defines the class of those who are entitled to invoke the suppression sanction of section 2515 . . . through the motion to suppress provided for by section 2518 (10)(a) . . . ." *Id.*, at 91. "The provision [§ 2515] must, of course, be read in light of section 2518 (10)(a) . . . which defines the class entitled to make a motion to suppress." *Id.*, at 96. "This provision [§ 2518 (10)(a)] must be read in connection with sections 2515 and 2517 . . . which it limits. It provides the remedy for the right created by section 2515." *Id.*, at 106.

[22] Because the District Court and the Court of Appeals erroneously held that grand jury witnesses have no right to invoke a § 2515 defense in contempt proceedings under § 1826 (a), we need not decide whether Gelbard and Parnas may refuse to answer questions if the interceptions of their conversations were pursuant to court order. That is a matter for the District Court to consider in the first instance.

[23] The Court of Appeals vacated the judgments of contempt and remanded for hearings to determine whether the questions asked respondents resulted from the illegal interception of their communications. 450 F. 2d, at 217. Although, in this Court, the

MR. JUSTICE DOUGLAS, concurring.

Although I join in the opinion of the Court, I believe that, independently of any statutory refuge which Congress may choose to provide, the Fourth Amendment shields a grand jury witness from any question (or any subpoena) which is based upon information garnered from searches which invade his own constitutionally protected privacy.

I would hold that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 offends the Fourth Amendment, as does all wiretapping and bugging, for reasons which I have often expressed elsewhere. *E. g., Cox* v. *United States,* 406 U. S. 934; *Williamson* v. *United States,* 405 U. S. 1026; *Katz* v. *United States,* 389 U. S. 347, 359; *Berger* v. *New York,* 388 U. S. 41, 64; *Osborn* v. *United States,* 385 U. S. 323, 340; *Pugach* v. *Dollinger,* 365 U. S. 458, 459; *On Lee* v. *United States,* 343 U. S. 747, 762. In each of the present cases a grand jury witness seeks to prove and suppress suspected unconstitutional seizures of his own telephone conversations. And, in every relevant respect, the proceedings below were in striking parallel to those in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385.

In that case, after federal agents unlawfully seized papers belonging to the Silverthornes and to their lumber company, the documents were returned upon order of the court. In the interim, however, the agents had copied them. After returning the seized originals, the prosecutor attempted to regain possession of them by issuing a grand jury subpoena *duces tecum.* When the petitioners refused to comply with the subpoena they

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Government now denies that there was any overhearing, in view of our affirmance that is a matter for the District Court to consider in the first instance.

were convicted of contempt. In reversing those judgments, this Court, through Mr. Justice Holmes, held that the Government was barred from reaping any fruit from its forbidden act and wove into our constitutional fabric the celebrated maxim that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." 251 U. S., at 392.

Petitioners Gelbard and Parnas and respondents Egan and Walsh occupy positions which are virtually identical to that of the Silverthornes and their company. They desire to demonstrate that but for unlawful surveillance of them the grand jury would not now be seeking testimony from them. And, as in *Silverthorne,* they are the victims of the alleged violations, seeking to mend no one's privacy other than their own. Finally, here, as there, the remedy preferred is permission to refuse to render the requested information.

Unless *Silverthorne* is to be overruled and uprooted from those decisions which have followed it, such as *Nardone* v. *United States,* 308 U. S. 338, 340–341; *Benanti* v. *United States,* 355 U. S. 96, 103; *Elkins* v. *United States,* 364 U. S. 206, 210; *Mapp* v. *Ohio,* 367 U. S. 643, 648; *Wong Sun* v. *United States,* 371 U. S. 471, 484–485; *Harrison* v. *United States,* 392 U. S. 219, 222; and *Alderman* v. *United States,* 394 U. S. 165, 171, 177, these witnesses deserve opportunities to prove their allegations and, if successful, to withhold from the Government any further rewards of its "dirty business." *Olmstead* v. *United States,* 277 U. S. 438, 470 (Holmes, J., dissenting).

The Solicitor General does not propose that *Silverthorne* be overruled. Nor does he deny its remarkable similarity. Indeed, his analysis of the constitutional issue at stake here fails even to mention that landmark de-

cision.[1] And none of the precedents cited by him detract from *Silverthorne*'s vitality.[2]

Rather, the Government treats this decision as a "novel

[1] At oral argument, counsel for the United States contended that *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, was distinguishable. First, it was said that in these cases there has yet been no showing of illegal surveillance. Tr. of Oral Arg. 26. The point is, however, that these witnesses claim to be able to make such a showing, although none of the trial courts below have permitted hearings on the issue. Second, it was also argued that *Silverthorne* was inapposite because there the very papers seized unlawfully were the ones later sought under the court's subpoena. *Ibid.* But there is little doubt that Mr. Justice Holmes' reasoning would also have relieved the Silverthornes from testifying before the grand jury as to the contents of the purloined papers.

[2] Three of the cases cited by the Solicitor General stand for nothing more than the rule that a defendant may not challenge prior to trial the evidence from which the indictment was drawn. *Costello* v. *United States*, 350 U. S. 359; *Lawn* v. *United States*, 355 U. S. 339; *United States* v. *Blue*, 384 U. S. 251. To be sure, the other authorities cited rejected various privileges from testifying but only for reasons which are not in conflict with *Silverthorne Lumber Co.* v. *United States*, *supra*. For example, in *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52; and *Piemonte* v. *United States*, 367 U. S. 556, in light of our dispositions in those cases, no threatened constitutional violation remained as a predicate for a privilege. For in *Murphy* we eliminated the threat that testimony to a state grand jury given in exchange for a state immunity grant could, despite the witness' fears to the contrary, be used against him by other jurisdictions. And in *Piemonte* the Fifth Amendment basis for declining to answer was dissolved by the majority's finding that there had been a proper grant of immunity. True, *Goldstein* v. *United States*, 316 U. S. 114, 121, and *Alderman* v. *United States*, 394 U. S. 165, denied standing to defendants to suppress the fruits of Fourth Amendment injuries to others, but that issue is not presented here inasmuch as all of these movants purported to be victims of intercepted conversations. Finally, *Blair* v. *United States*, 250 U. S. 273, held that a grand jury witness may not withhold evidence solely because he believes that the statutes (which the grand jury suspects may have been violated) are unconstitutional. That contention, of course, has not been tendered by these grand jury witnesses. Moreover, *Blair* itself

extension" of Fourth Amendment protections, leaning heavily upon the observation that the exclusionary rule has never been extended to "provide that illegally seized evidence is inadmissible against anyone for any purpose." *Alderman, supra,* at 175. This aphorism is contravened, concludes the Solicitor General, by any result permitting a nondefendant to "suppress" evidence sought to be introduced at another's trial or to withhold testimony from a grand jury investigation of someone else.

To be sure, no majority of this Court has ever held that "anything which deters illegal searches is thereby commanded by the Fourth Amendment." *Id.,* at 174. But that concern is not at stake here. No one is attempting to assert vicariously the rights of others. Here it is only necessary to adhere to the basic principle that victims of unconstitutional practices are themselves entitled to effective remedies. For, "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell* v. *Hood,* 327 U. S. 678, 684. And see *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U. S. 388.

The fact that the movants below sought to *withhold* evidence does not transform these cases into unusual ones. A witness is often permitted to retain exclusive custody of information where a contrary course would jeopardize important liberties such as First Amendment guarantees, *Watkins* v. *United States,* 354 U. S. 178; *NAACP* v. *Alabama,* 357 U. S. 449, 463; *Gibson* v. *Florida Legislative Investigation Committee,* 372 U. S. 539; *Baird* v. *State Bar of Arizona,* 401 U. S. 1, 6–7; *In re Stolar,* 401

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recognizes that "for special reasons a witness may be excused from telling all that he knows." *Id.,* at 281. "Special reasons" presumably was meant to include Fourth Amendment grounds, as was permitted shortly thereafter in *Silverthorne.*

U. S. 23; Fifth Amendment privileges, *Hoffman* v. *United States*, 341 U. S. 479, or traditional testimonial privileges.[3]

The same is true of Fourth Amendment authority to withhold evidence, even from a grand jury. *Hale* v. *Henkel*, 201 U. S. 43; *Silverthorne*, *supra*. No one would doubt, for example, that under *Bell* v. *Hood*, *supra*, and *Bivens*, *supra* (or *Monroe* v. *Pape*, 365 U. S. 167, where state police were concerned), a telephone subscriber could obtain an injunction against unlawful wiretapping of his telephone despite the fact that such termination might remove from the Government's reach evidence with which it could convict third parties.

A contrary judgment today would cripple enforcement of the Fourth Amendment. For, if these movants, who the Solicitor General concedes are not the prosecutors' targets, were required to submit to interrogation, then they (unlike prospective defendants) would have no further opportunity to vindicate their injuries. More generally, because surveillances are often "directed primarily to the collecting and maintaining of intelligence with respect to subversive forces, and are not an attempt to gather evidence for specific criminal prosecutions," *United States* v. *United States District Court*, 407 U. S. 297, 318–319, the normal exclusionary threat of *Weeks* v. *United States*, 232 U. S. 383, would be sharply attenuated and intelligence centers would be loosed from virtually every deterrent against abuse.[4] Furthermore, even

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[3] *E. g.*, *Alexander* v. *United States*, 138 U. S. 353 (lawyer-client); *Blau* v. *United States*, 340 U. S. 332 (marital); *United States* v. *Reynolds*, 345 U. S. 1 (military aircraft specifications).

[4] Our remark in *United States* v. *United States District Court*, 407 U. S. 297, 318–319, was our understanding only of the motivation behind federal national security wiretapping. But the statistical evidence shows that nonsecurity wiretapping also is seldom used to convict criminals. In 1969, court-ordered federal wiretapping seized 44,940 conversations but only 26 convictions were obtained. In 1970,

where the "uninvited ear" is used to obtain criminal convictions, rather than for domestic spying, a rule different from our result today would supply police with an added incentive to record the conversations of suspected coconspirators in order to marshal evidence against alleged ringleaders. We are told that "[p]olice are often tempted to make illegal searches during the investigations of a large conspiracy. Once the police have established that several individuals are involved, they may deem it worthwhile to violate the constitutional rights of one member of the conspiracy (particularly a minor member) in order to obtain evidence for use against others." White & Greenspan, Standing to Object to Search and Seizure, 118 U. Pa. L. Rev. 333, 351 (1970) (footnotes omitted). Because defendants are normally denied "standing" to suppress evidence procured as a result of invasions of others' privacy, today's remedy is necessary to help neutralize the prosecutorial reward of such tactics.

Today's remedy assumes an added and critical measure of importance for, due to the clandestine nature of electronic eavesdropping, other inhibitions on officers' abuse, such as the threat of damage actions, reform through the political process, and adverse publicity, will be of little avail in guarding privacy.

Moreover, when a court assists the Government in extracting fruits from the victims of its lawless searches it degrades the integrity of the judicial system. For "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp* v. *Ohio*, 367 U. S. 643, 659. For this reason, our decisions have em-

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federal court orders permitted the seizure of 147,780 communications, with 48 convictions. H. Schwartz, A Report on the Costs and Benefits of Electronic Surveillance ii–v (1971).

braced the view that "[t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts, which are charged at all times with support of the Constitution." *Weeks* v. *United States*, 232 U. S. 383, 392. As mentioned earlier, this principle was at the heart of the *Silverthorne* decision. Later in his dissent in *Olmstead* v. *United States*, 277 U. S., at 470, a case in which federal wiretappers had violated an Oregon law, Mr. Justice Holmes, citing *Silverthorne*, thought that both the officers and the court were honor bound to observe the state law: "If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed." In the same case, Justice Brandeis, who was then alone in his view that wiretapping was a search within the meaning of the Fourth Amendment, phrased it this way: "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." *Id.*, at 485.

In an entrapment case, Mr. Justice Frankfurter, with whom Justices Harlan, BRENNAN, and I joined, thought that "the federal courts have an obligation to set their face against enforcement of the law by lawless means" because "[p]ublic confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law; is the transcending value at stake." *Sherman* v. *United States*, 356 U. S. 369, 380 (concurring in result); see also his opinion for the Court in *Nardone* v. *United States*, 308 U. S. 338, 340–341. In a Self-

Incrimination Clause decision, MR. JUSTICE BRENNAN (joined by MR. JUSTICE MARSHALL and myself) used fewer words: "it is monstrous that courts should aid or abet the lawbreaking police officer." *Harris* v. *New York*, 401 U. S. 222, 232 (dissenting opinion).

These standards are at war with the Government's claim that intelligence agencies may invoke the aid of the courts in order to compound their neglect of constitutional values. To be sure, at some point taint may become so attenuated that ignoring the original blunder will not breed contempt for law. But here judges are not asked merely to overlook infractions diminished by time and independent events. Rather, if these witnesses' allegations are correct, judges are being invited to become the handmaidens of intentional [5] police lawlessness by ordering these victims to elaborate on their telephonic communications of which the prosecutors would have no knowledge but for their unconstitutional surveillance.

In summary, I believe that *Silverthorne* was rightly decided, that it was rooted in our continuing policy to equip victims of unconstitutional searches with effective means of redress, that it has enjoyed repeated praise in subsequent decisions, that it has not been seriously challenged here, and that it requires that we affirm the Third Circuit in *Egan* and *Walsh* and reverse the Ninth Circuit in *Gelbard* and *Parnas*.

MR. JUSTICE WHITE, concurring.

Under 28 U. S. C. § 1826 (a) a witness who refuses to testify "without just cause" may be held in contempt of court. Here, grand jury witnesses are involved, and the just cause claimed to excuse them is that the testimony demanded involves the disclosure and use of communica-

[5] As Mr. Justice Fortas said, wiretapping "is usually the product of calculated, official decision rather than the error of an individual agent of the state." *Alderman* v. *United States*, 394 U. S., at 203.

tions allegedly intercepted in violation of the controlling federal statute and hence inadmissible under 18 U. S. C. § 2515.

The United States asserts that § 2515 affords no excuse to grand jury witnesses under any circumstances. Reliance is placed on § 2518 (10)(a) and the legislative history of the statute. I agree with the Court, however, that at least where the United States has intercepted communications without a warrant in circumstances where court approval was required, it is appropriate in construing and applying 28 U. S. C. § 1826 not to require the grand jury witness to answer and hence further the plain policy of the wiretap statute. This unquestionably works a change in the law with respect to the rights of grand jury witnesses, but it is a change rooted in a complex statute, the meaning of which is not immediately obvious as the opinions filed today so tellingly demonstrate.

Where the Government produces a court order for the interception, however, and the witness nevertheless demands a full-blown suppression hearing to determine the legality of the order, there may be room for striking a different accommodation between the due functioning of the grand jury system and the federal wiretap statute. Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings. At the same time, prosecutors and other officers who have been granted and relied on a court order for the interception would be subject to no liability under the statute, whether the order is valid or not; and, in any event, the deterrent value of excluding the evidence will be marginal at best. It is well, therefore, that the Court has left this issue open for consideration by the District Court on remand. See *ante*, at 61 n. 22.

Of course, where the Government officially denies the fact of electronic surveillance of the witness, the matter is at an end and the witness must answer.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL join, dissenting.

Disposition of these cases depends on the sorting out of admittedly conflicting implications from different sections of the principal statute involved. The Court's conclusion, while supportable if regard be had only for the actual language of the sections, is by no means compelled by that language. Its conclusion is reached in utter disregard of the relevant legislative history, and quite without consideration of the sharp break that it represents with the historical *modus operandi* of the grand jury. It is, in my opinion, wrong.

The Court states the question to be whether witnesses threatened with contempt under 28 U. S. C. § 1826 (a) "are entitled to invoke this prohibition of § 2515 as a defense to contempt charges brought against them for refusing to testify." *Ante*, at 43. The question as thus framed by the Court has been so abstracted and refined, and divorced from the particulars of these two cases, as to virtually invite the erroneous answer that the opinion of the Court gives.

Nor is it accurate to "assume," as the Court does, that the Government's overhearing of these witnesses was in violation of the applicable statute. Petitioner Gelbard contended in the trial court that the United States planned to use his electronically overheard conversations as one basis for questioning him before the grand jury, and so stated in a presentation to that court. The Government in a reply affidavit stated that whatever information had been gathered as a result of electronic overhearing had been obtained from wiretaps conducted

pursuant to court order as provided in 18 U. S. C. § 2518.[1] Parnas, so far as this record shows, made no similar allegation in the trial court. The Court of Appeals in its opinion described the position taken by these witnesses in the following language:

> "When cited for contempt in the district court, each attacked the constitutional validity of Section 2518, and additionally urged that he should not be required to testify until and unless first allowed to inspect all applications, orders, tapes and transcripts relating to such electronic surveillance and afforded an opportunity to suppress the use before the grand jury of any evidence so secured . . . ." 443 F. 2d 837, 838.

Thus what was presented to the trial court in this proceeding under 18 U. S. C. § 1826 (a) was not a neatly stipulated question of law, but a demand by the petitioners that they be permitted to roam at will among the prosecutor's records in order to see whether they might be able to turn up any evidence indicating that the Government's overhearing of their conversations had been unauthorized by statute. In order to determine whether this particular type of remedy is open to these petitioners at this particular stage of potential criminal proceedings it is not enough to recite, as the Court does, that 18 U. S. C. § 2515 prohibits the use of illegally overheard wire communications before grand juries as well as before other governmental bodies. This

[1] In the case of respondents Egan and Walsh, the Government in the District Court did not state whether it had engaged in electronic surveillance. In this Court, however, the Government represented that respondents Egan and Walsh had not been subjected to electronic surveillance. In light of this development, I would remand their case to the District Court in order to give the respondents another opportunity to testify. For this reason, references to "petitioners" throughout this opinion are meant to be to only petitioners Gelbard and Parnas.

proposition is not disputed. The far more difficult inquiry posed by these facts is whether the granting to these petitioners, at this particular stage of these proceedings, of sweeping discovery as a prelude to a full hearing on the issue of alleged unlawful surveillance can fairly be inferred from the enactment by Congress of the two statutes relied on in the Court's opinion.

I

It may be helpful at the outset to treat briefly the background of 28 U. S. C. § 1826 (a). As the Court notes, this provision was enacted as a part of the Organized Crime Control Act of 1970, and the Senate Report states that it was intended to codify the "present practice" of the federal courts. S. Rep. No. 91–617, p. 148 (1969). The existing practice of the federal courts prior to the enactment of this section was based on Fed. Rule Crim. Proc. 42 and on 18 U. S. C. § 401, both of which dealt generally with the power of courts to punish for contempt. The enactment of § 1826 (a) appears to have resulted from a desire on the part of Congress to treat separately from the general contempt power of courts their authority to deal with recalcitrant witnesses in court or grand jury proceedings. Since, as the Senate Report states, the enactment of this provision was designed to "codify present practice" it is instructive to note the types of claims litigated in connection with grand jury matters under Rule 42 and 18 U. S. C. § 401 prior to the enactment of this new section. So far as the reported decisions of this Court and of the lower federal courts reveal, prior litigation with respect to grand juries has dealt almost exclusively with questions of privilege, and most of these cases have dealt with issues of the privilege against self-incrimination. While it is plain that the respondent in such proceedings was entitled to a hearing and to adduce evidence, it is equally plain that the

typical hearing was short in duration and largely devoted to the arguments of counsel on an agreed statement of facts.[2]

Some of the flavor of the type of proceeding contemplated under the prior practice is gleaned from the following passage in the Court's opinion in *Shillitani* v. *United States*, 384 U. S. 364, 370 (1966) (citations omitted):

> "There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt . . . . And it is essential that courts be able to compel the appearance and testimony of witnesses . . . . A grand jury subpoena must command the same respect . . . . Where contempt consists of a refusal to obey a court order to testify at any stage in judicial proceedings, the witness may be confined until compliance . . . ."

These proceedings seem almost invariably to have been short and summary in nature, not because the defendant was to be denied a fair hearing, but because the type of issue that could be raised at such a proceeding was one which did not generally permit extensive factual development. Even where a court of appeals reversed a contempt adjudication because of the district court's failure to allow the defendant to testify on his own behalf with respect to material issues, there was no hint of either the right to, or the necessity for, any discovery proceedings against the Government. *Hooley* v. *United States*, 209 F. 2d 219 (CA1 1954).

Congress was, of course, free to expand the scope of inquiry in these proceedings, to enlarge the issues to

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[2] See, *e. g.*, *Blau* v. *United States*, 340 U. S. 159 (1950); *Rogers* v. *United States*, 340 U. S. 367 (1951); *Curcio* v. *United States*, 354 U. S. 118 (1957); *United States* v. *George*, 444 F. 2d 310 (CA6 1971); *In re October 1969 Grand Jury*, 435 F. 2d 350 (CA7 1970).

be tried, and to alter past practice in any other way that it chose consistently with the Constitution. But in view of the stated congressional intent to "codify present practice" by the enactment of § 1826 (a), we should require rather strong evidence of congressional purpose to conclude that Congress intended to engraft on the traditional and rather summary contempt hearings a new type of hearing in which a grand jury witness is accorded *carte blanche* discovery of all of the Government's "applications, orders, tapes, and transcripts relating to such electronic surveillance" before he may be required to testify. 443 F. 2d, at 838.

II

Just as Congress was not writing on a clean slate in the area of contempt hearings, it was not writing on a clean slate with respect to the nature of grand jury proceedings. These petitioners were called before a grand jury that had been convened to investigate violations of federal laws. We deal, therefore, not with the rights of a criminal defendant in the traditional adversary context of a trial, but with the status of witnesses summoned to testify before a body devoted to sifting evidence that could result in the presentment of criminal charges. Just as the cases arising under the antecedents of 28 U. S. C. § 1826 (a) suggest a limitation on the type of issue which may be litigated in such a proceeding, cases dealing with the role of the grand jury stress the unique breadth of its scope of inquiry. In *Blair* v. *United States*, 250 U. S. 273, 282 (1919), this Court defined the vital investigatory function of the grand jury:

> "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of

> the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning. . . ."

Another passage from *Blair* pointed out the citizen's obligation to obey the process of the grand jury:

> "[I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned." *Id.*, at 281.

In *Costello* v. *United States*, 350 U. S. 359, 362 (1956), the Court traced the development of the English grand jury and concluded that the probable intent of the Framers of our Constitution was to parallel that institution as it had existed in England where "[g]rand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules." 350 U. S., at 362. The Court in *Costello* was at pains to point out the necessity of limiting the nature of challenges to evidence adduced before a grand jury if that body were to retain its traditional comprehensive investigative authority:

> "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on the kind of preliminary trial to determine the competency and

> adequacy of the evidence before the grand jury." 350 U. S., at 363.

While this general statement applied by its terms only to one who was ultimately indicted by the grand jury, its reasoning applies with like force to one who seeks to make an evidentiary challenge to grand jury proceedings on the basis of his status as a prospective witness. Indeed, time-consuming challenges by witnesses during the course of a grand jury investigation would be far more inimical to the function of that body than would a motion to dismiss an indictment after it had concluded its deliberations.

In *Lawn* v. *United States*, 355 U. S. 339 (1958), the Court refused to accord to petitioners the hearing, prior to trial, on the issue of whether or not a grand jury which indicted them had made direct or derivative use of materials the use of which by an earlier grand jury had been held to violate the petitioners' privilege against self-incrimination. In supporting its conclusion that the petitioners should not even be accorded a hearing to sustain these contentions, the Court quoted a passage from *Costello* describing the grand jury as

> "'[an] institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial.'" 355 U. S., at 350.

It seems to me to be clear beyond cavil from these cases that prior to the enactment of the Omnibus Crime Control and Safe Streets Act of 1968, a hearing such as

that which the Court awards these petitioners was not only unauthorized by law, but completely contrary to the ingrained principles which have long governed the functioning of the grand jury.

III

When Congress set out to enact the two statutes on which the Court relies, it was certainly not with any announced intent to change the nature of contempt hearings relating to grand jury proceedings, or to change the *modus operandi* of the grand jury. Instead, largely in response to the decisions of this Court in *Berger* v. *New York*, 388 U. S. 41 (1967), and *Katz* v. *United States*, 389 U. S. 347 (1967), Congress undertook to draft comprehensive legislation both authorizing the use of evidence obtained by electronic surveillance on specified conditions, and prohibiting its use otherwise. S. Rep. No. 1097, 90th Cong., 2d Sess., 66 (1968). The ultimate result was the 1968 Act. Critical to analysis of the issue involved here are §§ 2515 and 2518 (10)(a) of that Act, which provide in pertinent part as follows:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority . . . if the disclosure of that information would be in violation of this chapter." § 2515.
>
> "Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any

intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval. . . ." § 2518 (10)(a).

Here is presented at the very least an implied conflict between two separate sections of the same Act. Section 2515 proscribes generally the use of unlawfully intercepted communications as evidence before a number of specified bodies, including a grand jury. Section 2518 (10)(a) provides for the type of hearing that petitioners sought and were denied by the District Court; it provides such hearings in connection with a number of specified legal proceedings, but it conspicuously omits proceedings before a grand jury. The method by which the Court solves this dilemma is to state that if petitioners succeed after their discovery in establishing their claim of unlawful electronic surveillance, their questioning before the grand jury on the basis of such electronic surveillance would violate § 2515 as, of course, it presumptively would. Therefore, says the Court, petitioners *must* be entitled to the discovery and factual hearing which they seek, even though § 2518 (10)(a) rather clearly denies it to them by implication.

A construction which I believe at least equally plausible, based simply on the juxtaposition of the various sections of the statute, is that § 2515 contains a basic proscription of certain conduct, but does not attempt to specify remedies or rights arising from a breach of that proscription; the specification of remedies is left

to other sections. Other sections provide several remedies; criminal and civil sanctions are imposed by §§ 2511 and 2520, whereas § 2518 (10)(a) accords a right to a suppression hearing in specified cases. Thus the fact that one who may be the victim of alleged unlawful surveillance on the part of the Government is not accorded an *Alderman*-type suppression hearing (*Alderman* v. *United States*, 394 U. S. 165 (1969)) under the provisions of § 2518 (10)(a) is not left remediless to such a degree that it must be presumed to have been an oversight; he is remitted to the institution of civil proceedings, or the filing of a complaint leading to the institution of a criminal prosecution. While the latter two remedies may not be as efficacious in many situations as a suppression hearing, the remission of an aggrieved party to those remedies certainly does not render nugatory the general proscription contained in § 2515.

The omission of "grand jury" from the designated forums in § 2518 (10)(a) is not explainable on the basis that though the testimony is sought to be adduced before a grand jury, the motion to suppress would actually be made in a court, which is one of the forums designated in § 2518 (10)(a). The language "in any trial, hearing, or proceeding in or before" quite clearly refers to the forum in which the testimony is sought to be adduced. But even more significant is the inclusion among the designated forums of "department," "officer," "agency," and "regulatory body." Congress has almost without exception provided that issues as to the legality and propriety of subpoenas issued by either agencies or executive departments should be resolved by the courts. It has accomplished this result by requiring the agency to bring an independent judicial action to enforce obedience to its subpoena. See, *e. g.*, 15 U. S. C. § 79r, Public Utility Holding Company Act of 1935; 15 U. S. C. § 78u, Securities Exchange Act of 1934; 41 U. S. C. §§ 35–45, Walsh-

Healey Act; 50 U. S. C. App. § 2155, Defense Production Act of 1950; 47 U. S. C. §§ 409 (f) and (g), Communications Act of 1934; 46 U. S. C. § 1124, Merchant Marine Act, 1936; 26 U. S. C. § 7604, Internal Revenue Code of 1954; 16 U. S. C. § 825f (c), Electric Utility Companies Act; 15 U. S. C. § 717m (d), Natural Gas Act; 7 U. S. C. § 511n, Tobacco Inspection Act. This general mode of enforcement of agency investigative subpoenas was discussed in the context of the Fair Labor Standards Act in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186 (1946).

Thus, if Congress in § 2518 had intended to focus on the forum in which the hearing as to the legality of the subpoena is to be determined, rather than the forum in which the testimony is sought to be adduced, it would have omitted not only grand juries, but departments, officers, agencies, and regulatory bodies as well from the coverage of § 2518 (10)(a). For questions as to the legality of subpoenas issued by all these bodies are resolved in the courts. By omitting only grand juries in § 2518, Congress indicated that it was dealing with the forum in which the testimony was sought to be adduced, and that the suppression hearing authorized by the section was not to be available to grand jury witnesses.

In the light of these conflicting implications from the statutory language itself, resort to the legislative history is appropriate. Passages from the legislative history cited by the Court in its opinion do not focus at all on the availability of a suppression hearing in grand jury proceedings; they simply speak in general terms of the congressional intent to prohibit and penalize unlawful electronic surveillance, of which intent there can, of course, be no doubt. But several parts of the legislative history address themselves, far more particularly than any relied upon by the Court in its opinion, to the actual issue before us. The Senate Report, for example,

indicates as plainly as possible that the exclusion of grand juries from the language of § 2518 (10)(a) was deliberate:

> "This provision [§ 2518 (10)(a)] must be read in connection with sections 2515 and 2517, discussed above, *which it limits.* It provides the remedy for the right created by section 2515. Because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual. [*United States* v. *Blue,* 384 U. S. 251 (1966).] There is no intent to change this general rule. It is the intent of the provision only that when a motion to suppress is granted in another context, its scope may include use in a future grand jury proceeding." S. Rep. No. 1097, 90th Cong., 2d Sess., 106 (1968). (Emphasis added.)

There is an intimation in the opinion of the Court that the reason this language was used may have been that grand juries do not pass upon motions to suppress, while courts do. This intimation is not only inconsistent with the language of the section itself, as pointed out, *supra,* at 80, but it attributes to the drafters of the report a lower level of understanding of the subject matter with which they were dealing than I believe is justified. It is also rather squarely contradicted by the statement that there is no limitation on the character of evidence that may be presented to a grand jury "which is enforcible by an individual." Had the report meant to stress the presumably well-known fact that grand juries do not themselves grant motions to suppress, it would not have

used that language, nor would it have cited *United States* v. *Blue,* 384 U. S. 251 (1966).

The fact that the report states the reason for the policy adopted in terms of the rights of an "individual," rather than in terms of the rights of a "defendant," makes the Court's discussion of the doctrine of various cases, *ante,* at 60, of doubtful help in construing the statute. Whatever *United States* v. *Blue, supra,* may be said to "hold" after careful analysis by this Court, the drafters of the Senate Report undoubtedly took it to stand for the proposition for which they cited it. As stated by Mr. Justice Frankfurter, concurring in *Green* v. *United States,* 356 U. S. 165, 189:

> "The fact that scholarship has shown that historical assumptions regarding the procedure for punishment of contempt of court were ill-founded, hardly wipes out a century and a half of the legislative and judicial history of federal law based on such assumptions."

Not only does the report dealing with § 2518 (10)(a) make clear that it is to be construed in connection with § 2515, which it limits, but the section of the same report dealing with § 2515 re-emphasizes this conclusion. Speaking of the latter section, the report says:

> "The provision must, of course, be read in light of section 2518 (10)(a) discussed below, which defines the class entitled to make a motion to suppress. It largely reflects existing law. . . . Nor generally [is there any intention] to press the scope of the suppression rule beyond present search and seizure law. See *Walder* v. *United States,* 347 U. S. 62 (1954). . . . The provision thus forms an integral part of the system of limitations designed to protect privacy. Along with the criminal and

> civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications." S. Rep. No. 1097, 90th Cong., 2d Sess., 96 (1968).

The conclusion that § 2518 (10)(a) is the exclusive source of the right to move to suppress is further fortified by the Senate Report's comment on § 2510 (11) of the Act, which defines an "aggrieved person" as one who is a party to an "intercepted wire or oral communication or a person against whom the interception was directed." The Senate Report, p. 91, states:

> "This definition defines the class of those who are entitled to invoke the suppression sanction of section 2515 discussed below, *through the motion to suppress provided for by section 2518 (10)(a), also discussed below.* It is intended to reflect existing law . . . ." (Citations omitted.) (Emphasis added.)

Finally, § 2518 (9) requires the Government to provide to each party to "any trial, hearing or other proceeding" a copy of the court order authorizing surveillance if the Government intends to use the fruits thereof. The Senate Report, p. 105, states:

> " 'Proceeding' is intended to include all adversary type hearings. . . . It would not include a grand jury hearing. Compare [*United States* v. *Blue, supra*]."

If § 2515 of the Omnibus Crime Control and Safe Streets Act of 1968 stood alone without any informative legislative history, the Court's conclusion with respect to the rights of these petitioners would be plainly correct. If the conflicting implications from two sections of the same statute were present in a regulatory scheme which was to stand by itself, rather than to be superimposed on procedures such as contempt hearings and

institutions such as the grand jury, the Court's conclusion would at least be tenable. But when the Court concludes that Congress, almost in a fit of absentmindedness, has drastically enlarged the right of potential grand jury witnesses to avoid testifying, and when such a conclusion is based upon one of two ambiguous implications from the language of the statute, and is contrary to virtually every whit of legislative history addressed to the point in issue, I think its conclusion is plainly wrong.

IV

The Court seeks to bolster its reasoning by reliance upon 18 U. S. C. § 3504 (a)(1), which was a part of the Organized Crime Control Act of 1970. That section provides in pertinent part as follows:

> "(a) In any . . . proceeding . . . before any . . . grand jury . . .
>
> "(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act."

Assuming, *arguendo*, that this section does apply to petitioners in No. 71–110, the record in the District Court and the opinion of the Court of Appeals clearly show that only Gelbard made what might be called a "claim" within the language of the section, and that the Government in its response did "affirm or deny" the occurrence of the alleged unlawful act; in fact, the Government denied the occurrence of the unlawful act. This should be sufficient for disposition of the case as to these petitioners.

The Court, without giving much guidance to those who would seek to follow the path by which it reaches the conclusion, concludes that this section "confirms that

Congress meant that grand jury witnesses might defend contempt charges by invoking the prohibition of § 2515 against the compelled disclosure of evidence obtained in violation of Title III." If the Court means to say any more than that, under the circumstances specified in § 3504, the Government must affirm or deny, I am at a loss how it extracts additional requirements from the language used by Congress in that section.

But even if the Court were correct in deciding that § 3504 (a)(1) requires more than it says of the Government, I believe the Court errs in deciding that this section applies at all to these petitioners. Title VII as enacted actually consists of two parts, A and B. Part A is a series of findings by Congress, reading as follows:

> "The Congress finds that claims that evidence offered in proceedings was obtained by the exploitation of unlawful acts, and is therefore inadmissible in evidence, (1) often cannot reliably be determined when such claims concern evidence of events occurring years after the allegedly unlawful act, and (2) when the allegedly unlawful act has occurred more than five years prior to the event in question, there is virtually no likelihood that the evidence offered to prove the event has been obtained by the exploitation of that allegedly unlawful act." § 701, 84 Stat. 935.

The House Report (to accompany S. 30) contains this comment on Part A:

> "This section contains a special finding relating, *as do the following sections of the title,* to certain evidentiary problems created by electronic surveillance conducted by the Government *prior to the enactment of Public Law 90–351 on June 19, 1968,* which provided statutory authority for obtaining surveillance warrants in certain types of criminal

investigations." H. R. Rep. No. 91–1549, p. 50 (1970). (Emphasis supplied.)

The same report, in its introductory discussion of Title VII, contains the following statement:

> "Title VII intends to limit disclosure of information illegally obtained by the Government to defendants who seek to challenge the admissibility of evidence because it is either the primary or indirect production [*sic*] of such an illegal act. The title also prohibits any challenge to the admissibility of evidence based on its being the fruit of an unlawful governmental act, if such act occurred 5 years or more before the event sought to be proved. As amended by the committee, the application of title VII is *limited* to Federal judicial and administrative proceedings, and *to electronic or mechanical surveillance which occurred prior to June 19, 1968,* the date of enactment of the Federal wiretapping and electronic surveillance law (chapter 119, title 18, United States Code)." *Id.*, at 34. (Emphasis supplied.)

The Senate Report, too, casts § 3504 (a)(1) in quite a different light from that in which the Court puts it:

> "Lastly, it should be noted that nothing in section 3504 (a)(1) is intended to codify or change present law defining illegal conduct or prescribing requirements for standing to object to such conduct or to use of evidence given under an immunity grant. See, *e. g., Giordano* v. *United States,* 394 U. S. 310 (1969); *Alderman* v. *United States,* 394 U. S. 165 (1969). *Nevertheless, since it requires a pending claim as a predicate to disclosure, it sets aside the present wasteful practice of the Department of Justice in searching files without a motion from a de-*

fendant. . . ." S. Rep. No. 91–617, p. 154 (1969). (Emphasis supplied.)

These conclusions in the Senate Report are supported by statements of the bill's managers in the House during the time it was being debated. Congressman Poff explained Title VII as follows:

> "Title VII of S. 30 . . . would, first, reverse the Supreme Court's decision in *Alderman* v. *United States*, 394 U. S. 165 (1969) requiring, under its supervisory power, the disclosure of Government files in criminal trials, and . . . would, second, set a 5-year 'statute of limitations' on inserting issues dealing with the 'fruit of the poisonous tree' in similar cases." 116 Cong. Rec. 35192.

Congressman Celler explained the amendments incorporating the pre-June 19, 1968, time limitation into subsections (a)(2) and (a)(3) of § 3504 that had been made by a subcommittee of the House Judiciary Committee in these words:

> "As amended by the committee, the application of title VII is limited to Federal judicial and administrative proceedings, and to electronic or mechanical surveillance which occurred prior to June 19, 1968, the date of enactment of the Federal wiretapping and electronic surveillance law—chapter 119, title XVIII, United States Code." *Id.*, at 35196.

Even more specific was the explanation of the amendment made by Congressman Poff on the floor of the House after the time provisions had been included:

> "TITLE VII — LITIGATION CONCERNING SOURCES OF EVIDENCE
>
> "Mr. Chairman, title VII of the Organized Crime Control Act is designed to regulate motions to suppress evidence in certain limited situations where

the motion is based upon unlawful electronic eavesdropping or wiretapping *which occurred prior to the enactment of the Federal electronic surveillance laws on June 19, 1968* . . . .

. . . . . .

"Where there was in fact an unlawful overhearing prior to June 19, 1968, the title provides for an in camera examination of the Government's transcripts and records to determine whether they may be relevant to the claim of inadmissibility. . . . To the extent that the court is permitted to determine relevancy in an ex parte proceeding, the title will modify the procedure established by the Supreme Court in *Alderman* v. *United States* [citation omitted]. . . .

"*As I have indicated, the title applies only to disclosures where the electronic surveillance occurred prior to June 19, 1968.* It is not necessary that it apply to disclosure *where an electronic surveillance occurred after that date,* because *such disclosure will be mandated, not by Alderman, but by section 2518 of title 18,* United States Code, added by title III of the Omnibus Crime Control and Safe Streets Act of 1968. Section 2518 (10) [(a)] provides a specific procedure for motions to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that the communication was unlawfully intercepted, that the authorization for the interception was insufficient, or that the interception was not made in conformity with the authorization obtained. It provides, insofar as the disclosure of intercepted communications is concerned, that upon the filing of a motion to suppress by an aggrieved person the trial judge may in his discretion make available to such person and his counsel for inspec-

tion such portions of an intercepted communication, or evidence derived therefrom, as the judge determines to be in the interest of justice—see Senate Report No. 1097, 90th Congress, 2d Session 106, 1968. *The provisions of this title will, therefore control the disclosure of transcripts of electronic surveillances conducted prior to June 19, 1968. Thereafter, existing statutory law, not Alderman, will control.* Consequently, *in view of these amendments to* title VII, its enactment, in conjunction with *the provisions of title III of the 1968 act, provides the Federal Government with a comprehensive and integrated set of procedural rules governing suppression litigation concerning electronic surveillance." Id.,* at 35293–35294. (Emphasis added.)

The weight of the findings actually enacted by Congress in Part A and the uniform tenor of the legislative history outweigh, in my opinion, the ambiguity arising from the failure to actually include a cutoff date in § 3504 (a)(1).

Section 3504 (a)(1) by its terms, even if read totally out of its context and background, as the Court seeks to do, affords these petitioners no help because the Government has complied with its requirements in these cases. But more importantly, the entire thrust of the findings actually adopted by Congress, and of the reports of both Houses, makes it as plain as humanly possible that this section was intended as a *limitation* on existing rights of criminal defendants, not as an *enlargement* of them. Congress, displeased with the effect of this Court's decision in *Alderman, supra,* desired to put a statute of limitations type cutoff beyond which the Government would not be required to go in time in order to disprove taint. Equally displeased with the policy adopted by the Government of searching its files for evidence of taint even when none had been alleged

by the defendant, it sought to put a stop to that practice by requiring the Government to "affirm or deny" only where there is "a claim by a party aggrieved that evidence is inadmissible." Understanding of this background not only affords a complete explanation of the language used by Congress in this section, but illustrates the palpable error into which the Court has fallen in construing it. The Court has at least figuratively stood on its head both the language and the legislative history of this section in order to conclude that it was intended to expand the rights of criminal defendants.

V

Neither the Omnibus Crime Control and Safe Streets Act of 1968 nor the Organized Crime Control Act of 1970, when construed in accordance with the canons of statutory construction traditionally followed by this Court, supports the expansive and novel claims asserted by these petitioners. The Court having reached a contrary conclusion, I respectfully dissent.

POLICE DEPARTMENT OF THE CITY OF CHICAGO ET AL. *v.* MOSLEY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 70–87. Argued January 19, 1972—Decided June 26, 1972

City ordinance prohibiting all picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute, found by the Court of Appeals to be unconstitutional because overbroad, *held* violative of the Equal Protection Clause of the Fourteenth Amendment since it makes an impermissible distinction between peaceful labor picketing and other peaceful picketing. Pp. 94–102.

432 F. 2d 1256, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, WHITE, and POWELL, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 102. BLACKMUN and REHNQUIST, JJ., concurred in the result.

Richard L. Curry argued the cause for petitioners. With him on the briefs were *William R. Quinlan* and *Edmund Hatfield.*

Harvey J. Barnett argued the cause for respondent. With him on the brief were *Ronald L. Barnard* and *Hal M. Brown.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

At issue in this case is the constitutionality of the following Chicago ordinance:

> "A person commits disorderly conduct when he knowingly:
>
> . . . . . .
>
> "(i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school build-

> ing while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute . . . ." Municipal Code, c. 193–1 (i).

The suit was brought by Earl Mosley, a federal postal employee, who for seven months prior to the enactment of the ordinance had frequently picketed Jones Commercial High School in Chicago. During school hours and usually by himself, Mosley would walk the public sidewalk adjoining the school, carrying a sign that read: "Jones High School practices black discrimination. Jones High School has a black quota." His lonely crusade was always peaceful, orderly, and quiet, and was conceded to be so by the city of Chicago.

On March 26, 1968, Chapter 193–1 (i) was passed, to become effective on April 5. Seeing a newspaper announcement of the new ordinance, Mosley contacted the Chicago Police Department to find out how the ordinance would affect him; he was told that, if his picketing continued, he would be arrested. On April 4, the day before the ordinance became effective, Mosley ended his picketing next to the school.[1] Thereafter, he brought this action in the United States District Court for the Northern District of Illinois, seeking declaratory and injunctive relief, pursuant to 28 U. S. C.

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[1] Occasionally, thereafter, Mosley would picket across the street, outside the 150-foot zone. At the hearing below, Mosley testified that "when I was across the street from the school, 150 feet away, you cannot hardly see me. The question that all of the people asked me was, 'Where is the school located?' They don't even see the school across the street, you know. So, what it does, it takes away a certain amount of the effectiveness . . . . [W]hen I am across the street, I am sort of out of the picture . . . ." App. 24–25.

§ 2201 and 42 U. S. C. § 1983. He alleged a violation of constitutional rights in that (1) the statute punished activity protected by the First Amendment; and (2) by exempting only peaceful labor picketing from its general prohibition against picketing, the statute denied him "equal protection of the law in violation of the First and Fourteenth Amendments . . . ."

After a hearing, the District Court granted a directed verdict dismissing the complaint. The Seventh Circuit reversed, holding that because the ordinance prohibited even peaceful picketing next to a school, it was overbroad and therefore "patently unconstitutional on its face." 432 F. 2d 1256, 1259 (1970). We granted certiorari, 404 U. S. 821 (1971), to consider this case along with *Grayned* v. *City of Rockford, post,* p. 104, in which an almost identical ordinance was upheld by the Illinois Supreme Court, 46 Ill. 2d 492, 496, 263 N. E. 2d 866, 868 (1970). We affirm the judgment of the Seventh Circuit, although we decide this case on the ground not reached by that court. We hold that the ordinance is unconstitutional because it makes an impermissible distinction between labor picketing and other peaceful picketing.

I

The city of Chicago exempts peaceful labor picketing from its general prohibition on picketing next to a school.[2] The question we consider here is whether this selective exclusion from a public place is permitted. Our answer is "No."

Because Chicago treats some picketing differently from others, we analyze this ordinance in terms of the

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[2] By its terms, the statute exempts "the peaceful picketing of any school involved in a labor dispute." It is undisputed that this exemption applies only to *labor* picketing of a school involved in a labor dispute.

Equal Protection Clause of the Fourteenth Amendment. Of course, the equal protection claim in this case is closely intertwined with First Amendment interests;[3] the Chicago ordinance affects picketing, which is expressive conduct; moreover, it does so by classifications formulated in terms of the subject of the picketing. As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment. See *Reed* v. *Reed*, 404 U. S. 71, 75–77 (1971); *Weber* v. *Aetna Casualty Co.*, 406 U. S. 164 (1972); *Dunn* v. *Blumstein*, 405 U. S. 330, 335 (1972).

The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *Cohen* v. *California*, 403 U. S. 15, 24 (1971); *Street* v. *New York*, 394 U. S. 576 (1969); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269–270 (1964), and cases cited; *NAACP* v. *Button*, 371 U. S. 415, 445 (1963); *Wood* v. *Georgia*, 370 U. S. 375, 388–389 (1962); *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949); *De Jonge* v. *Oregon*, 299 U. S. 353, 365 (1937). To permit the continued building of our politics

[3] For discussions of the First Amendment-Equal Protection intersection, see Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 29–30; T. Emerson, The System of Freedom of Expression 303–304, 305–307 (1970). Blasi, Prior Restraints on Demonstrations, 68 Mich. L. Rev. 1482, 1492–1497 (1970); Van Alstyne, Political Speakers at State Universities: Some Constitutional Considerations, 111 U. Pa. L. Rev. 328, 337–339 (1963); see also *Niemotko* v. *Maryland*, 340 U. S. 268, 272 (1951).

and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan, supra,* at 270.

Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," [4] and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Guided by these principles, we have frequently condemned such discrimination among different users of the same medium for expression. In *Niemotko* v. *Maryland,* 340 U. S. 268 (1951), a group of Jehovah's Witnesses were denied a permit to use a city park for Bible talks, although other political and religious groups had been allowed to put the park to analogous uses. Concluding that the permit was denied because of the city's "dislike for or disagreement with the Witnesses

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[4] A. Meiklejohn, Political Freedom: The Constitutional Powers of The People 27 (1948).

or their views," this Court held that the permit refusal violated "[t]he right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments." *Id.*, at 272. The Court followed *Niemotko* in *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953), where again the Jehovah's Witnesses were refused permission to conduct religious services in a park, although other religious groups had been permitted to do so. Similarly, because of their potential use as instruments for selectively suppressing some points of view, this Court has condemned licensing schemes that lodge broad discretion in a public official to permit speech-related activity, see, *e. g.*, *Shuttlesworth* v. *Birmingham*, 394 U. S. 147 (1969); *Cox* v. *Louisiana*, 379 U. S. 536, 555–558 (1965); *Staub* v. *City of Baxley*, 355 U. S. 313, 321–325 (1958), and cases cited; *Saia* v. *New York*, 334 U. S. 558, 560–562 (1948).[5]

The late Mr. Justice Black, who thought that picketing was not only a method of expressing an idea but also conduct subject to broad state regulation, nevertheless recognized the deficiencies of laws like Chicago's ordinance. This was the thrust of his opinion concurring in *Cox* v. *Louisiana*, 379 U. S. 536 (1965):

> "[B]y specifically permitting picketing for the publication of labor union views [but prohibiting

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[5] See also *Tinker* v. *Des Moines School District*, 393 U. S. 503, 510–511 (1969); *Adderley* v. *Florida*, 385 U. S. 39, 47 (1966); *Carlson* v. *California*, 310 U. S. 106, 112 (1940); *Wirta* v. *Alameda-Contra Costa Transit District*, 68 Cal. 2d 51, 434 P. 2d 982 (1967); *Bynum* v. *Schiro*, 219 F. Supp. 204 (ED La. 1963), aff'd, 375 U. S. 395 (1964); *East Meadow Assn.* v. *Board of Education*, 18 N. Y. 2d 129, 219 N. E. 2d 172 (1966); *Matter of Madole* v. *Barnes*, 20 N. Y. 2d 169, 229 N. E. 2d 20 (1967); *United States* v. *Crowthers*, 456 F. 2d 1074 (CA4 1972); and the litigation in *Ellis* v. *Dixon*, 349 U. S. 458 (1955). Cf. *Flower* v. *United States*, 407 U. S. 197 (1972).

other sorts of picketing], Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments. And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to use the streets to voice opinions on other subjects, also amounts, I think, to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment." *Id.*, at 581.

We accept Mr. Justice Black's quoted views. Cf. *NLRB* v. *Fruit & Vegetable Packers*, 377 U. S. 58, 76 (1964) (Black, J., concurring).

II

This is not to say that all picketing must always be allowed. We have continually recognized that reasonable "time, place and manner" regulations of picketing may be necessary to further significant governmental interests. *Cox* v. *New Hampshire*, 312 U. S. 569, 575–576 (1941); *Poulos* v. *New Hampshire*, 345 U. S. 395, 398 (1953); *Cox* v. *Louisiana*, 379 U. S., at 554–555; *Cox* v. *Louisiana*, 379 U. S. 559 (1965); *Adderley* v. *Florida*, 385 U. S. 39, 46–48 (1966). Similarly, under an equal protection analysis, there may be sufficient regulatory interests justifying selective exclusions or distinctions among pickets. Conflicting demands on the same place may compel the State to make choices among potential users and uses. And the State may have a legitimate interest in prohibiting some picketing to protect public order. But these justifications for selective exclusions

from a public forum must be carefully scrutinized. Because picketing plainly involves expressive conduct within the protection of the First Amendment, see, *e. g., Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *Teamsters Union* v. *Newell,* 356 U. S. 341 (1958); *Garner* v. *Louisiana,* 368 U. S. 157, 185 (1961) (Harlan, J., concurring in judgment); *Edwards* v. *South Carolina,* 372 U. S. 229 (1963); *Cox* v. *Louisiana, supra,* at 546; *Food Employees* v. *Logan Valley Plaza,* 391 U. S. 308, 314–315 (1968); *id.,* at 337 (WHITE, J., dissenting); *Gregory* v. *Chicago,* 394 U. S. 111, 112 (1969); *Shuttlesworth* v. *Birmingham,* 394 U. S., at 155, discriminations among pickets must be tailored to serve a substantial governmental interest. Cf. *Williams* v. *Rhodes,* 393 U. S. 23 (1968).

III

In this case, the ordinance itself describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter. The regulation "thus slip[s] from the neutrality of time, place, and circumstance into a concern about content."[6] This is never permitted. In spite of this, Chicago urges that the ordinance is not improper content censorship, but rather a device for preventing disruption of the school. Cities certainly have a substantial interest in stopping picketing which disrupts a school. "The crucial question, however, is whether [Chicago's ordinance] advances that objective in a manner consistent with the command of the Equal Protection Clause." *Reed* v. *Reed,* 404 U. S., at 76. It does not.

[6] Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 29. Cf. *Cox* v. *Louisiana,* 379 U. S. 536, 556 n. 14, where the Court noted that the exemption for labor picketing in a statute otherwise barring on its face all street assemblies and parades, "points up the fact that the statute reaches beyond mere traffic regulation to restrictions on expression."

Although preventing school disruption is a city's legitimate concern, Chicago itself has determined that peaceful labor picketing during school hours is not an undue interference with school. Therefore, under the Equal Protection Clause, Chicago may not maintain that other picketing disrupts the school unless that picketing is clearly more disruptive than the picketing Chicago already permits. Cf. *Tinker* v. *Des Moines School District*, 393 U. S. 503, 511 (1969); *Wirta* v. *Alameda-Contra Costa Transit District*, 68 Cal. 2d 51, 434 P. 2d 982 (1967). If peaceful labor picketing is permitted, there is no justification for prohibiting all nonlabor picketing, both peaceful and nonpeaceful. "Peaceful" nonlabor picketing, however the term "peaceful" is defined, is obviously no more disruptive than "peaceful" labor picketing. But Chicago's ordinance permits the latter and prohibits the former. Such unequal treatment is exactly what was condemned in *Niemotko* v. *Maryland*, 340 U. S., at 272–273.

Similarly, we reject the city's argument that, although it permits peaceful labor picketing, it may prohibit all nonlabor picketing because, as a class, nonlabor picketing is more prone to produce violence than labor picketing.[7] Predictions about imminent disruption from picketing in-

[7] The city notes in its brief, pp. 28–30:

"Although the civil rights movement has understandably endeavored to press into its service the constitutional precedents developed in labor relations litigation, there are important differences between labor picketing and picketing by civil rights groups. . . . Labor picketing is now usually token picketing. . . . It seldom leads to disruption of the public peace, hardly ever to window smashing, arson. Labor picketing can be carried on without interrupting classes or even distracting the students. . . . As we all know, student demonstrations at schools—and even such demonstrations by parents and 'concerned citizens'—are utterly different. Mass picketing, sit-ins, smashed windows have been the order of the day. The very purpose of such demonstrations often is to bring the educational process to a halt."

volve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis. "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker* v. *Des Moines School District*, 393 U. S., at 508. Some labor picketing is peaceful, some disorderly; the same is true of picketing on other themes. No labor picketing could be more peaceful or less prone to violence than Mosley's solitary vigil. In seeking to restrict nonlabor picketing that is clearly more disruptive than peaceful labor picketing, Chicago may not prohibit all nonlabor picketing at the school forum.

The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives. *Williams* v. *Rhodes*, 393 U. S. 23 (1968); see generally *Dunn* v. *Blumstein*, 405 U. S., at 342–343.[8] Chicago may not vindicate its interest in preventing disruption by the wholesale exclusion of picketing on all but one preferred subject. Given what Chicago tolerates from labor picketing, the excesses of some nonlabor picketing may not be

[8] In a variety of contexts we have said that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960). This standard, of course, has been carefully applied when First Amendment interests are involved. *E. g., Schneider* v. *State*, 308 U. S. 147, 164 (1939); *De Jonge* v. *Oregon*, 299 U. S. 353, 364–365 (1937); *Cantwell* v. *Connecticut*, 310 U. S. 296, 307 (1940); *NAACP* v. *Button*, 371 U. S. 415, 438 (1963); *Cox* v. *Louisiana*, 379 U. S. 559, 562–564 (1965); *United States* v. *O'Brien*, 391 U. S. 367 (1968).

controlled by a broad ordinance prohibiting both peaceful and violent picketing. Such excesses "can be controlled by narrowly drawn statutes," *Saia* v. *New York*, 334 U. S., at 562, focusing on the abuses and dealing even-handedly with picketing regardless of subject matter. Chicago's ordinance imposes a selective restriction on expressive conduct far "greater than is essential to the furtherance of [a substantial governmental] interest." *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968). Far from being tailored to a substantial governmental interest, the discrimination among pickets is based on the content of their expression. Therefore, under the Equal Protection Clause, it may not stand.[9]

The judgment is

Affirmed.

MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST concur in the result.

MR. CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion but with the reservation that some of the language used in the discussion of the First

[9] Chicago argued below that the labor exemption in the ordinance was necessitated by federal pre-emption of the regulation of labor relations. The city now recognizes that the National Labor Relations Act specifically exempts States and subdivisions (and therefore cities and their public school boards) from the definition of "employer" within the Act. 29 U. S. C. § 152. Nevertheless, Chicago urges that the pre-emption argument still has "some merit." It argues that "since observance by employees of private employers of picket lines of public employees can have repercussions in the federal sphere, the City was well advised to avoid this quagmire of labor law and labor relations by exempting labor picketing from the ordinance." Reply Brief 12. This attenuated interest, at best a claim of small administrative convenience and perhaps merely a confession of legislative laziness, cannot justify the blanket permission given to labor picketing and the blanket prohibition applicable to others.

Amendment could, if read out of context, be misleading. Numerous holdings of this Court attest to the fact that the First Amendment does not literally mean that we "are guaranteed the right to express any thought, free from government censorship." This statement is subject to some qualifications, as for example those of *Roth* v. *United States*, 354 U. S. 476 (1957); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). See also *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964).

GRAYNED *v.* CITY OF ROCKFORD

APPEAL FROM THE SUPREME COURT OF ILLINOIS

No. 70–5106. Argued January 19, 1972—Decided June 26, 1972

1. Antipicketing ordinance, virtually identical with one invalidated as violative of equal protection in *Police Department of Chicago* v. *Mosley, ante,* p. 92, is likewise invalid. P. 107.
2. Antinoise ordinance prohibiting a person while on grounds adjacent to a building in which a school is in session from willfully making a noise or diversion that disturbs or tends to disturb the peace or good order of the school session is not unconstitutionally vague or overbroad. The ordinance is not vague since, with fair warning, it prohibits only actual or imminent, and willful, interference with normal school activity, and is not a broad invitation to discriminatory enforcement. *Cox* v. *Louisiana,* 379 U. S. 536; *Coates* v. *Cincinnati,* 402 U. S. 611, distinguished. The ordinance is not overbroad as unduly interfering with First Amendment rights since expressive activity is prohibited only if it "materially disrupts classwork." *Tinker* v. *Des Moines School District,* 393 U. S. 503, 513. Pp. 107–121.

46 Ill. 2d 492, 263 N. E. 2d 866, affirmed in part and reversed in part.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a statement joining in the judgment and in Part I of the Court's opinion and concurring in the result as to Part II of the opinion, *post,* p. 121. DOUGLAS, J., filed an opinion dissenting in part and joining in Part I of the Court's opinion, *post,* p. 121.

Sophia H. Hall argued the cause for appellant. With her on the briefs were *William R. Ming, Jr.,* and *Aldus S. Mitchell.*

William E. Collins argued the cause for appellee. With him on the brief were *A. Curtis Washburn* and *Charles F. Thomas.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Appellant Richard Grayned was convicted for his part in a demonstration in front of West Senior High School in Rockford, Illinois. Negro students at the school had first presented their grievances to school administrators. When the principal took no action on crucial complaints, a more public demonstration of protest was planned. On April 25, 1969, approximately 200 people—students, their family members, and friends—gathered next to the school grounds. Appellant, whose brother and twin sisters were attending the school, was part of this group. The demonstrators marched around on a sidewalk about 100 feet from the school building, which was set back from the street. Many carried signs which summarized the grievances: "Black cheerleaders to cheer too"; "Black history with black teachers"; "Equal rights, Negro counselors." Others, without placards, made the "power to the people" sign with their upraised and clenched fists.

In other respects, the evidence at appellant's trial was sharply contradictory. Government witnesses reported that the demonstrators repeatedly cheered, chanted, baited policemen, and made other noise that was audible in the school; that hundreds of students were distracted from their school activities and lined the classroom windows to watch the demonstration; that some demonstrators successfully yelled to their friends to leave the school building and join the demonstration; that uncontrolled latenesses after period changes in the school were far greater than usual, with late students admitting that they had been watching the demonstration; and that, in general, orderly school procedure was disrupted. Defense witnesses claimed that the demonstrators were at all times quiet and orderly; that they did not seek to violate the law, but only to "make

a point"; that the only noise was made by policemen using loudspeakers; that almost no students were noticeable at the schoolhouse windows; and that orderly school procedure was not disrupted.

After warning the demonstrators, the police arrested 40 of them, including appellant.[1] For participating in the demonstration, Grayned was tried and convicted of violating two Rockford ordinances, hereinafter referred to as the "antipicketing" ordinance and the "antinoise" ordinance. A $25 fine was imposed for each violation. Since Grayned challenged the constitutionality of each ordinance, he appealed directly to the Supreme Court of Illinois. Ill. Sup. Ct. Rule 302. He claimed that the ordinances were invalid on their face, but did not urge that, as applied to him, the ordinances had punished constitutionally protected activity. The Supreme Court of Illinois held that both ordinances were constitutional on their face. 46 Ill. 2d 492, 263 N. E. 2d 866 (1970). We noted probable jurisdiction, 404 U. S. 820 (1971). We conclude that the antipicketing ordinance is unconstitutional, but affirm the court below with respect to the antinoise ordinance.

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[1] Police officers testified that "there was no way of picking out any one in particular" while making arrests. Report of Proceedings in Circuit Court, 17th Judicial Circuit, Winnebago County 66. However, apparently only males were arrested. *Id.*, at 65, 135, 147. Since appellant's sole claim in this appeal is that he was convicted under facially unconstitutional ordinances, there is no occasion for us to evaluate either the propriety of these selective arrests or the sufficiency of evidence that appellant himself actually engaged in conduct within the terms of the ordinances. MR. JUSTICE DOUGLAS, in concluding that appellant's particular behavior was protected by the First Amendment, reaches a question not presented by the parties here or in the court below. See Tr. of Oral Arg. 16–17; Jurisdictional Statement 3; *City of Rockford* v. *Grayned*, 46 Ill. 2d 492, 494, 263 N. E. 2d 866, 867 (1970).

I

At the time of appellant's arrest and conviction, Rockford's antipicketing ordinance provided that

> "A person commits disorderly conduct when he knowingly:
>
> . . . . . .
>
> "(i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute . . . ." Code of Ordinances, c. 28, § 18.1 (i).

This ordinance is identical to the Chicago disorderly conduct ordinance we have today considered in *Police Department of Chicago* v. *Mosley, ante,* p. 92. For the reasons given in *Mosley,* we agree with dissenting Justice Schaefer below, and hold that § 18.1 (i) violates the Equal Protection Clause of the Fourteenth Amendment. Appellant's conviction under this invalid ordinance must be reversed.[2]

II

The antinoise ordinance reads, in pertinent part, as follows:

> "[N]o person, while on public or private grounds adjacent to any building in which a school or any

[2] In November 1971, the antipicketing ordinance was amended to delete the labor picketing proviso. As Rockford notes, "This amendment and deletion has, of course, no effect on Appellant's personal situation." Brief 2. Necessarily, we must consider the facial constitutionality of the ordinance in effect when appellant was arrested and convicted.

> class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof. . . ." Code of Ordinances, c. 28, § 19.2 (a).

Appellant claims that, on its face, this ordinance is both vague and overbroad, and therefore unconstitutional. We conclude, however, that the ordinance suffers from neither of these related infirmities.

A. Vagueness

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.[3] Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.[4] A vague law impermissibly delegates

[3] *E. g., Papachristou* v. *City of Jacksonville,* 405 U. S. 156, 162 (1972); *Cramp* v. *Board of Public Instruction,* 368 U. S. 278, 287 (1961); *United States* v. *Harriss,* 347 U. S. 612, 617 (1954); *Jordan* v. *De George,* 341 U. S. 223, 230–232 (1951); *Lanzetta* v. *New Jersey,* 306 U. S. 451, 453 (1939); *Connally* v. *General Construction Co.,* 269 U. S. 385, 391 (1926); *United States* v. *Cohen Grocery Co.,* 255 U. S. 81, 89 (1921); *International Harvester Co.* v. *Kentucky,* 234 U. S. 216, 223–224 (1914).

[4] *E. g., Papachristou* v. *City of Jacksonville, supra; Coates* v. *Cincinnati,* 402 U. S. 611, 614 (1971); *Gregory* v. *Chicago,* 394 U. S. 111, 120 (1969) (Black, J., concurring); *Interstate Circuit* v. *Dallas,* 390 U. S. 676, 684–685 (1968); *Ashton* v. *Kentucky,* 384 U. S. 195, 200 (1966); *Giaccio* v. *Pennsylvania,* 382 U. S. 399 (1966); *Shuttlesworth* v. *Birmingham,* 382 U. S. 87, 90–91 (1965); *Kunz* v. *New*

basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.[5] Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," [6] it "operates to inhibit the exercise of [those] freedoms." [7] Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." [8]

Although the question is close, we conclude that the antinoise ordinance is not impermissibly vague. The court below rejected appellant's arguments "that proscribed conduct was not sufficiently specified and that police were given too broad a discretion in determining whether conduct was proscribed." 46 Ill. 2d, at 494, 263 N. E. 2d, at 867. Although it referred to other, similar statutes it had recently construed and upheld, the court

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York, 340 U. S. 290 (1951); *Saia* v. *New York*, 334 U. S. 558, 559–560 (1948); *Thornhill* v. *Alabama*, 310 U. S. 88, 97–98 (1940); *Herndon* v. *Lowry*, 301 U. S. 242, 261–264 (1937).

[5] Where First Amendment interests are affected, a precise statute "evincing a legislative judgment that certain specific conduct be . . . proscribed," *Edwards* v. *South Carolina*, 372 U. S. 229, 236 (1963), assures us that the legislature has focused on the First Amendment interests and determined that other governmental policies compel regulation. See Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 32; *Garner* v. *Louisiana*, 368 U. S. 157, 200, 202 (1961) (Harlan, J., concurring in judgment).

[6] *Baggett* v. *Bullitt*, 377 U. S. 360, 372 (1964).

[7] *Cramp* v. *Board of Public Instruction*, 368 U. S., at 287.

[8] *Baggett* v. *Bullitt*, *supra*, at 372, quoting *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958). See *Interstate Circuit* v. *Dallas*, *supra*, at 684; *Ashton* v. *Kentucky*, *supra*, at 195, 200–201; *Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965); *Smith* v. *California*, 361 U. S. 147, 150–152 (1959); *Winters* v. *New York*, 333 U. S. 507 (1948); *Stromberg* v. *California*, 283 U. S. 359, 369 (1931).

below did not elaborate on the meaning of the antinoise ordinance.[9] In this situation, as Mr. Justice Frankfurter put it, we must "extrapolate its allowable meaning." [10] Here, we are "relegated . . . to the words of the ordinance itself," [11] to the interpretations the court below has given to analogous statutes,[12] and, perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it.[13] "Extrapolation," of course, is a delicate task, for it is not within our power to construe and narrow state laws.[14]

With that warning, we find no unconstitutional vagueness in the antinoise ordinance. Condemned to the use of words, we can never expect mathematical certainty from our language.[15] The words of the Rockford ordinance are marked by "flexibility and reasonable breadth, rather than meticulous specificity," *Esteban* v. *Central Missouri State College*, 415 F. 2d 1077, 1088 (CA8 1969) (Blackmun, J.), cert. denied, 398 U. S. 965 (1970), but we think it is clear what the ordinance as a whole prohibits. Designed, according to its preamble, "for the protection of Schools," the ordinance forbids deliberately

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[9] The trial magistrate simply charged the jury in the words of the ordinance. The complaint and verdict form used slightly different language. See n. 24, *infra*.

[10] *Garner* v. *Louisiana*, 368 U. S., at 174 (concurring in judgment).

[11] *Coates* v. *Cincinnati*, 402 U. S., at 614.

[12] *E. g., Gooding* v. *Wilson*, 405 U. S. 518 (1972).

[13] *E. g., Lake Carriers Assn.* v. *MacMullan*, 406 U. S. 498, 506–508 (1972); *Cole* v. *Richardson*, 405 U. S. 676 (1972); *Ehlert* v. *United States*, 402 U. S. 99, 105, 107 (1971); cf. *Poe* v. *Ullman*, 367 U. S. 497 (1961).

[14] *United States* v. *37 Photographs*, 402 U. S. 363, 369 (1971).

[15] It will always be true that the fertile legal "imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question." *American Communications Assn.* v. *Douds*, 339 U. S. 382, 412 (1950).

noisy or diversionary [16] activity that disrupts or is about to disrupt normal school activities. It forbids this willful activity at fixed times—when school is in session—and at a sufficiently fixed place—"adjacent" to the school.[17] Were we left with just the words of the ordinance, we might be troubled by the imprecision of the phrase "tends to disturb." [18] However, in *Chicago* v. *Meyer,* 44 Ill. 2d 1, 4, 253 N. E. 2d 400, 402 (1969), and *Chicago* v. *Gregory,* 39 Ill. 2d 47, 233 N. E. 2d 422 (1968), reversed on other grounds, 394 U. S. 111 (1969), the Supreme Court of Illinois construed a Chicago ordinance prohibiting, *inter alia,* a "diversion tending to disturb the peace," and held that it permitted conviction only where there was *"imminent* threat of violence." (Emphasis supplied.) See *Gregory* v. *Chicago,* 394 U. S. 111, 116–117, 121–122 (1969) (Black, J., concurring).[19] Since *Meyer* was specifically cited in the opinion below, and it in turn drew heavily on *Gregory,* we think it proper to conclude that the Supreme Court of Illinois would interpret the Rockford ordinance to prohibit only actual

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[16] "Diversion" is defined by Webster's Third New International Dictionary as "the act or an instance of diverting from one course or use to another . . . : the act or an instance of diverting (as the mind or attention) from some activity or concern . . . : a turning aside . . . : something that turns the mind from serious concerns or ordinary matters and relaxes or amuses."

[17] Cf. *Cox* v. *Louisiana,* 379 U. S. 559, 568–569 (1965) ("near" the courthouse not impermissibly vague).

[18] See *Gregory* v. *Chicago,* 394 U. S., at 119–120 (Black, J., concurring); *Gooding* v. *Wilson,* 405 U. S., at 525–527; *Craig* v. *Harney,* 331 U. S. 367, 372 (1947); cf. *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942) (statute punishing "fighting words," that have a *"direct* tendency to cause acts of violence," upheld); *Street* v. *New York,* 394 U. S. 576, 592 (1969).

[19] Cf. *Chicago* v. *Terminiello,* 400 Ill. 23, 79 N. E. 2d 39 (1948), reversed on other grounds, 337 U. S. 1, 6 (1949).

or imminent interference with the "peace or good order" of the school.[20]

Although the prohibited quantum of disturbance is not specified in the ordinance, it is apparent from the statute's announced purpose that the measure is whether normal school activity has been or is about to be disrupted. We do not have here a vague, general "breach of the peace" ordinance, but a statute written specifically for the school context, where the prohibited disturbances are easily measured by their impact on the normal activities of the school. Given this "particular context," the ordinance gives "fair notice to those to whom [it] is directed." [21] Although the Rockford ordinance may not be as precise as the statute we upheld in *Cameron* v. *Johnson*, 390 U. S. 611 (1968)—which prohibited picketing "in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from" any courthouse—we think that, as in *Cameron*, the ordinance here clearly "delineates its reach in words of common understanding." *Id.*, at 616.

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[20] Some intermediate appellate courts in Illinois appear to have interpreted the phrase "tending to" out of the Chicago ordinance entirely, at least in some contexts. *Chicago* v. *Hansen*, 337 Ill. App. 663, 86 N. E. 2d 415 (1949); *Chicago* v. *Holmes*, 339 Ill. App. 146, 88 N. E. 2d 744 (1949); *Chicago* v. *Nesbitt*, 19 Ill. App. 2d 220, 153 N. E. 2d 259 (1958); but cf. *Chicago* v. *Williams*, 45 Ill. App. 2d 327, 195 N. E. 2d 425 (1963).

In its brief, the city of Rockford indicates that its sole concern is with *actual* disruption. "[A] court and jury [are] charged with the duty of determining whether or not . . . a school *has been disrupted* and that the defendant's conduct, [no matter what it was,] caused or contributed to cause the disruption." Brief for Appellee 16 (emphasis supplied). This was the theory on which the city tried appellant's case to the jury, Report, *supra*, n. 1, at 12–13, although the jury was instructed in the words of the ordinance. As already noted, *supra*, n. 1, no challenge is made here to the Rockford ordinance as applied in this case.

[21] *American Communications Assn.* v. *Douds*, 339 U. S., at 412.

Cox v. *Louisiana*, 379 U. S. 536 (1965), and *Coates* v. *Cincinnati*, 402 U. S. 611 (1971), on which appellant particularly relies, presented completely different situations. In *Cox*, a general breach of the peace ordinance had been construed by state courts to mean "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet." The Court correctly concluded that, as construed, the ordinance permitted persons to be punished for merely expressing unpopular views.[22] In *Coates*, the ordinance punished the sidewalk assembly of three or more persons who "conduct themselves in a manner annoying to persons passing by . . . ." We held, in part, that the ordinance was impermissibly vague because enforcement depended on the completely subjective standard of "annoyance."

In contrast, Rockford's antinoise ordinance does not permit punishment for the expression of an unpopular point of view, and it contains no broad invitation to subjective or discriminatory enforcement. Rockford does not claim the broad power to punish all "noises" and "diversions." [23] The vagueness of these terms, by themselves, is dispelled by the ordinance's requirements that (1) the "noise or diversion" be actually incompatible with normal school activity; (2) there be a demonstrated causality between the disruption that occurs and the "noise or diversion"; and (3) the acts be

[22] Cf. *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Cantwell* v. *Connecticut*, 310 U. S. 296, 308 (1940). Similarly, in numerous other cases, we have condemned broadly worded licensing ordinances which grant such standardless discretion to public officials that they are free to censor ideas and enforce their own personal preferences. *Shuttlesworth* v. *Birmingham*, 394 U. S. 147 (1969); *Staub* v. *City of Baxley*, 355 U. S. 313 (1958); *Saia* v. *New York*, 334 U. S. 558 (1948); *Schneider* v. *State*, 308 U. S. 147, 163–164 (1939); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Hague* v. *CIO*, 307 U. S. 496 (1939).

[23] Cf. *Cox* v. *Louisiana*, 379 U. S. 536, 546–550 (1965); *Edwards* v. *South Carolina*, 372 U. S., at 234–237.

"willfully" done.[24] "Undesirables" or their "annoying" conduct may not be punished. The ordinance does not permit people to "stand on a public sidewalk . . . only at the whim of any police officer." [25] Rather, there must be demonstrated interference with school activities. As always, enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible. The Rockford City Council has made the basic policy choices, and has given fair warning as to what is prohibited. "[T]he ordinance defines boundaries sufficiently distinct" for citizens, policemen, juries, and appellate judges.[26] It is not impermissibly vague.

B. Overbreadth

A clear and precise enactment may nevertheless be "overbroad" if in its reach it prohibits constitutionally protected conduct.[27] Although appellant does not claim that, as applied to him, the antinoise ordinance has punished protected expressive activity, he claims that the ordinance is overbroad on its face. Because overbroad laws, like vague ones, deter privileged activity, our cases firmly establish appellant's standing to raise an overbreadth challenge.[28] The crucial question, then, is

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[24] Tracking the complaint, the jury verdict found Grayned guilty of "[w]ilfully causing diversion of good order of public school in session, in that while on school grounds and while school was in session, did wilfully make and assist in the making of a diversion which tended to disturb the peace and good order of the school session and class thereof."

[25] *Shuttlesworth* v. *Birmingham*, 382 U. S., at 90.

[26] *Chicago* v. *Fort*, 46 Ill. 2d 12, 16, 262 N. E. 2d 473, 476 (1970), a case cited in the opinion below.

[27] See *Zwickler* v. *Koota*, 389 U. S. 241, 249–250 (1967), and cases cited.

[28] *E. g.*, *Gooding* v. *Wilson*, 405 U. S. 518 (1972); *Coates* v. *Cincinnati*, 402 U. S., at 616; *Dombrowski* v. *Pfister*, 380 U. S., at 486, and cases cited; *Kunz* v. *New York*, 340 U. S. 290 (1951).

whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments. Specifically, appellant contends that the Rockford ordinance unduly interferes with First and Fourteenth Amendment rights to picket on a public sidewalk near a school. We disagree.

"In considering the right of a municipality to control the use of public streets for the expression of religious [or political] views, we start with the words of Mr. Justice Roberts that 'Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' *Hague* v. *CIO*, 307 U. S. 496, 515 (1939)." *Kunz* v. *New York*, 340 U. S. 290, 293 (1951). See *Shuttlesworth* v. *Birmingham*, 394 U. S. 147, 152 (1969). The right to use a public place for expressive activity may be restricted only for weighty reasons.

Clearly, government has no power to restrict such activity because of its message.[29] Our cases make equally clear, however, that reasonable "time, place and manner" regulations may be necessary to further significant governmental interests, and are permitted.[30] For example, two parades cannot march on the same street simultaneously, and government may allow only one. *Cox* v. *New Hampshire*, 312 U. S. 569, 576 (1941). A demonstration or parade on a large street during rush hour

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[29] *Police Department of Chicago* v. *Mosley*, *ante*, p. 92.

[30] *Cox* v. *New Hampshire*, 312 U. S. 569, 575–576 (1941); *Kunz* v. *New York*, 340 U. S., at 293–294; *Poulos* v. *New Hampshire*, 345 U. S. 395, 398 (1953); *Cox* v. *Louisiana*, 379 U. S., at 554–555; *Cox* v. *Louisiana*, 379 U. S. 559 (1965); *Adderley* v. *Florida*, 385 U. S. 39, 46–48 (1966); *Food Employees* v. *Logan Valley Plaza*, 391 U. S. 308, 320–321 (1968); *Shuttlesworth* v. *Birmingham*, 394 U. S. 147 (1969).

might put an intolerable burden on the essential flow of traffic, and for that reason could be prohibited. *Cox* v. *Louisiana*, 379 U. S., at 554. If overamplified loudspeakers assault the citizenry, government may turn them down. *Kovacs* v. *Cooper*, 336 U. S. 77 (1949); *Saia* v. *New York*, 334 U. S. 558, 562 (1948). Subject to such reasonable regulation, however, peaceful demonstrations in public places are protected by the First Amendment.[31] Of course, where demonstrations turn violent, they lose their protected quality as expression under the First Amendment.[32]

The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable."[33] Although a silent vigil may not unduly interfere with a public library, *Brown* v. *Louisiana*, 383 U. S. 131 (1966), making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved;[34] the regulation must be nar-

[31] *Police Department of Chicago* v. *Mosley*, *ante*, at 95–96, and cases cited.

[32] See generally T. Emerson, The System of Freedom of Expression 328–345 (1970).

[33] Wright, The Constitution on the Campus, 22 Vand. L. Rev. 1027, 1042 (1969). Cf. *Cox* v. *Louisiana*, 379 U. S. 559 (1965); *Adderley* v. *Florida*, 385 U. S. 39 (1966); *Food Employees* v. *Logan Valley Plaza*, 391 U. S. 308 (1968); *Tinker* v. *Des Moines School District*, 393 U. S. 503 (1969).

[34] *E. g.*, *Schneider* v. *State*, 308 U. S. 147 (1939); *Talley* v. *California*, 362 U. S. 60 (1960); *Saia* v. *New York*, 334 U. S., at 562; *Cox* v. *New Hampshire*, 312 U. S., at 574; *Hague* v. *CIO*, 307 U. S., at 516. See generally Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1.

rowly tailored to further the State's legitimate interest.[35] Access to the "streets, sidewalks, parks, and other similar public places . . . for the purpose of exercising [First Amendment rights] cannot constitutionally be denied broadly . . . ." [36] Free expression "must not, in the guise of regulation, be abridged or denied." [37]

In light of these general principles, we do not think that Rockford's ordinance is an unconstitutional regulation of activity around a school. Our touchstone is *Tinker* v. *Des Moines School District*, 393 U. S. 503 (1969), in which we considered the question of how to accommodate First Amendment rights with the "special characteristics of the school environment." *Id.*, at 506. *Tinker* held that the Des Moines School District could not punish students for wearing black armbands to school in protest of the Vietnam war. Recognizing that " 'wide exposure to . . . robust exchange of ideas' " is an "important part of the educational process" and should be nurtured, *id.*, at 512, we concluded that free expression could not be barred from the school campus. We made clear that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression," *id.*, at 508,[38] and that particular expressive activity could not be prohibited because of a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," *id.*, at 509. But we nowhere suggested that students, teachers, or anyone else has an absolute constitutional right to use

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[35] *De Jonge* v. *Oregon*, 299 U. S. 353, 364–365 (1937); *Lovell* v. *Griffin*, 303 U. S., at 451; *Schneider* v. *State*, 308 U. S., at 164; *Cantwell* v. *Connecticut*, 310 U. S., at 307; *Cox* v. *Louisiana*, 379 U. S., at 562–564; *Davis* v. *Francois*, 395 F. 2d 730 (CA5 1968). Cf. *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960); *NAACP* v. *Button*, 371 U. S. 415, 438 (1963).

[36] *Food Employees* v. *Logan Valley Plaza*, 391 U. S., at 315.

[37] *Hague* v. *CIO*, 307 U. S., at 516.

[38] Cf. *Hague* v. *CIO*, *supra*, at 516.

all parts of a school building or its immediate environs for his unlimited expressive purposes. Expressive activity could certainly be restricted, but only if the forbidden conduct "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id.*, at 513. The wearing of armbands was protected in *Tinker* because the students "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder." *Id.*, at 514. Compare *Burnside* v. *Byars*, 363 F. 2d 744 (CA5 1966), and *Butts* v. *Dallas Ind. School District*, 436 F. 2d 728 (CA5 1971), with *Blackwell* v. *Issaquena County Board of Education*, 363 F. 2d 749 (CA5 1966).

Just as *Tinker* made clear that school property may not be declared off limits for expressive activity by students, we think it clear that the public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public. But in each case, expressive activity may be prohibited if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker* v. *Des Moines School District*, 393 U. S., at 513.[39]

We would be ignoring reality if we did not recognize that the public schools in a community are important institutions, and are often the focus of significant grievances.[40] Without interfering with normal school activi-

[39] In *Tinker* we recognized that the principle of that case was not limited to expressive activity within the school building itself. *Id.*, at 512 n. 6, 513–514. See *Esteban* v. *Central Missouri State College*, 415 F. 2d 1077 (CA8 1969) (Blackmun, J.), cert. denied, 398 U. S. 965 (1970); *Jones* v. *Board of Regents*, 436 F. 2d 618 (CA9 1970); *Hammond* v. *South Carolina State College*, 272 F. Supp. 947 (SC 1967), cited in *Tinker*.

[40] Cf. *Thornhill* v. *Alabama*, 310 U. S., at 102. It goes without saying that "one is not to have the exercise of his liberty of

ties, daytime picketing and handbilling on public grounds near a school can effectively publicize those grievances to pedestrians, school visitors, and deliverymen, as well as to teachers, administrators, and students. Some picketing to that end will be quiet and peaceful, and will in no way disturb the normal functioning of the school. For example, it would be highly unusual if the classic expressive gesture of the solitary picket disrupts anything related to the school, at least on a public sidewalk open to pedestrians.[41] On the other hand, schools could hardly tolerate boisterous demonstrators who drown out classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse.[42]

Rockford's antinoise ordinance goes no further than *Tinker* says a municipality may go to prevent interference with its schools. It is narrowly tailored to further Rockford's compelling interest in having an undisrupted school session conducive to the students' learning, and does not unnecessarily interfere with First Amendment rights. Far from having an impermissibly broad prophylactic ordinance,[43] Rockford punishes only conduct which disrupts or is about to disrupt normal school activities. That decision is made, as it should be, on an individualized basis, given the particular fact situation. Peaceful picketing which does not interfere with the ordinary functioning of the school is permit-

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expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U. S., at 163.

[41] Cf. *Jones* v. *Board of Regents*, *supra*.

[42] Cf. *Barker* v. *Hardway*, 283 F. Supp. 228 (SD W. Va.), aff'd, 399 F. 2d 638 (CA4 1968), cert. denied, 394 U. S. 905 (1969) (Fortas, J., concurring).

[43] See *Jones* v. *Board of Regents*, *supra*; *Hammond* v. *South Carolina State College*, *supra*.

ted. And the ordinance gives no license to punish anyone because of what he is saying.[44]

We recognize that the ordinance prohibits some picketing that is neither violent nor physically obstructive. Noisy demonstrations that disrupt or are incompatible with normal school activities are obviously within the ordinance's reach. Such expressive conduct may be constitutionally protected at other places or other times, cf. *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Cox* v. *Louisiana*, 379 U. S. 536 (1965), but next to a school, while classes are in session, it may be prohibited.[45] The antinoise ordinance imposes no such restriction on expressive activity before or after the school session, while the student/faculty "audience" enters and leaves the school.

In *Cox* v. *Louisiana*, 379 U. S. 559 (1965), this Court indicated that, because of the special nature of the place,[46] persons could be constitutionally prohibited from picketing "in or near" a courthouse "with the intent of interfering with, obstructing, or impeding the administration of justice." Likewise, in *Cameron* v. *Johnson*, 390 U. S. 611 (1968), we upheld a statute prohibiting

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[44] Compare *Scoville* v. *Board of Education*, 425 F. 2d 10 (CA7), cert. denied, 400 U. S. 826 (1970); *Dickey* v. *Alabama State Board of Education*, 273 F. Supp. 613 (MD Ala. 1967) (cited in *Tinker*).

[45] Different considerations, of course, apply in different circumstances. For example, restrictions appropriate to a single-building high school during class hours would be inappropriate in many open areas on a college campus, just as an assembly that is permitted outside a dormitory would be inappropriate in the middle of a mathematics class.

[46] Noting the need "to assure that the administration of justice at all stages is free from outside control and influence," we emphasized that "[a] State may protect against the possibility of a conclusion by the public . . . [that a] judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process." 379 U. S., at 562, 565.

picketing "in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouses." [47] As in those two cases, Rockford's modest restriction on some peaceful picketing represents a considered and specific legislative judgment that some kinds of expressive activity should be restricted at a particular time and place, here in order to protect the schools.[48] Such a reasonable regulation is not inconsistent with the First and Fourteenth Amendments.[49] The antinoise ordinance is not invalid on its face.[50]

The judgment is

Affirmed in part and reversed in part.

MR. JUSTICE BLACKMUN joins in the judgment and in Part I of the opinion of the Court. He concurs in the result as to Part II of the opinion.

MR. JUSTICE DOUGLAS, dissenting in part.

While I join Part I of the Court's opinion, I would also reverse the appellant's conviction under the antinoise ordinance.

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[47] Quoting *Schneider* v. *State*, 308 U. S., at 161, we noted that "'such activity bears no necessary relationship to the freedom to . . . distribute information or opinion.'" 390 U. S., at 617.

[48] Cf. *Garner* v. *Louisiana*, 368 U. S., at 202–203 (Harlan, J., concurring in judgment).

[49] Cf. *Adderley* v. *Florida*, 385 U. S. 39 (1966). In *Adderley*, the Court held that demonstrators could be barred from jailhouse grounds not ordinarily open to the public, at least where the demonstration obstructed the jail driveway and interfered with the functioning of the jail. In *Tinker* we noted that "a school is not like a hospital or a jail enclosure." 393 U. S., at 512 n. 6.

[50] It is possible, of course, that there will be unconstitutional applications; but that is not a matter which presently concerns us. See *Shuttlesworth* v. *Birmingham*, 382 U. S., at 91, and n. 1, *supra*.

The municipal ordinance on which this case turns is c. 28, § 19.2 (a) which provides in relevant part:

> "That no person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof."

Appellant was one of 200 people picketing a school and carrying signs promoting a black cause—"Black cheerleaders to cheer too," "Black history with black teachers," "We want our rights," and the like. Appellant, however, did not himself carry a picket sign. There was no evidence that he yelled or made any noise whatsoever. Indeed, the evidence reveals that appellant simply marched quietly and on one occasion raised his arm in the "power to the people" salute.

The pickets were mostly students; but they included former students, parents of students, and concerned citizens. They had made proposals to the school board on their demands and were turned down. Hence the picketing. The picketing was mostly by black students who were counseled and advised by a faculty member of the school. The school contained 1,800 students. Those counseling the students advised they must be quiet, walk hand in hand, no whispering, no talking.

Twenty-five policemen were stationed nearby. There was noise but most of it was produced by the police who used loudspeakers to explain the local ordinance and to announce that arrests might be made. The picketing did not stop, and some 40 demonstrators, including appellant, were arrested.

The picketing lasted 20 to 30 minutes and some students went to the windows of the classrooms to observe it. It is not clear how many there were. The picketing

was, however, orderly or, as one officer testified, "very orderly." There was no violence. And appellant made no noise whatever.

What Mr. Justice Roberts said in *Hague* v. *CIO*, 307 U. S. 496, 515–516, has never been questioned:

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

We held in *Cox* v. *Louisiana*, 379 U. S. 536, 544–545, that a State could not infringe the right of free speech and free assembly by convicting demonstrators under a "disturbing the peace" ordinance where all that the students in that case did was to protest segregation and discrimination against blacks by peaceably assembling and marching to the courthouse where they sang, prayed, and listened to a speech, but where there was no violence, no rioting, no boisterous conduct.

The school where the present picketing occurred was the center of a racial conflict. Most of the pickets were indeed students in the school. The dispute doubtless disturbed the school; and the blaring of the loudspeakers of the police was certainly a "noise or diversion" in the

meaning of the ordinance. But there was no evidence that appellant was noisy or boisterous or rowdy. He walked quietly and in an orderly manner. As I read this record, the disruptive force loosed at this school was an issue dealing with race—an issue that is preeminently one for solution by First Amendment means.* That is all that was done here; and the entire picketing, including appellant's part in it, was done in the best First Amendment tradition.

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*The majority asserts that "appellant's sole claim . . . is that he was convicted under facially unconstitutional ordinances" and that there is, therefore, no occasion to consider whether his activities were protected by the First Amendment. *Ante*, at 106 n. 1. Appellant argues, however, that the ordinance is overly broad in that it punishes constitutionally protected activity. A statute may withstand an overbreadth attack "only if, as authoritatively construed . . . , it is not susceptible of application to speech . . . that is protected by the First and Fourteenth Amendments." *Gooding* v. *Wilson*, 405 U. S. 518, 520 (1972). If the ordinance applies to appellant's activities and if appellant's activities are constitutionally protected, then the ordinance is overly broad and, thus, unconstitutional. There is no merit, therefore, to the Court's suggestion that the question whether "appellant's particular behavior was protected by the First Amendment," *ante*, at 106 n. 1, is not presented.

Syllabus

UNITED STATES *v.* BYRUM, EXECUTRIX

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 71–308. Argued March 1, 1972—Decided June 26, 1972

Decedent transferred to an irrevocable trust for the benefit of his children (and if they died before the trust ended, their surviving children) stock in three unlisted corporations that he controlled, retaining the right to vote the transferred stock, to veto the transfer by the trustee (a bank) of any of the stock, and to remove the trustee and appoint another corporate trustee as successor. The right to vote the transferred stock, together with the vote of the stock decedent owned at the time of his death, gave him a majority vote in each of the corporations. The Commissioner of Internal Revenue determined that the transferred stock was includable in decedent's gross estate under § 2036 (a) of the Internal Revenue Code of 1954, which requires the inclusion in a decedent's gross estate of the value of any property he has transferred by *inter vivos* gift, if he retained for his lifetime "(1) the . . . enjoyment of . . . the property transferred, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall . . . enjoy . . . the income therefrom." The Commissioner claimed that decedent's right to vote the transferred shares and to veto any sale by the trustee, together with the ownership of other shares, made the transferred shares includable under § 2036 (a)(2), because decedent retained control over corporate dividend policy and, by regulating the flow of income to the trust, could shift or defer the beneficial enjoyment of trust income between the present beneficiaries and remaindermen, and under § 2036 (a)(1) because, by reason of decedent's retained control over the corporations, he had the right to continue to benefit economically from the transferred shares during his lifetime. *Held:*

1. Decedent did not retain the "right," within the meaning of § 2036 (a)(2), to designate who was to enjoy the trust income. Pp. 131–144.

(a) A settlor's retention of broad management powers did not necessarily subject an *inter vivos* trust to the federal estate tax. Pp. 131–135.

(b) In view of legal and business constraints applicable to the payment of dividends, especially where there are minority stockholders, decedent's right to vote a majority of the shares in these corporations did not give him a *de facto* position tantamount to the power to accumulate income in the trust. Pp. 135–144.

2. Decedent's voting control of the stock did not constitute retention of the enjoyment of the transferred stock within the meaning of § 2036 (a) (1), since the decedent had transferred irrevocably the title to the stock and right to the income therefrom. Pp. 145–150.

440 F. 2d 949, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, STEWART, MARSHALL, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 151.

Matthew J. Zinn argued the cause for the United States. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Crampton, Loring W. Post*, and *Donald H. Olson*.

Larry H. Snyder argued the cause and filed a brief for respondent.

Simon H. Rifkind, Adrian W. DeWind, James B. Lewis, and *Maurice Austin* filed a brief for Gilman et al., Executors, as *amici curiae* urging affirmance.

MR. JUSTICE POWELL delivered the opinion of the Court.

Decedent, Milliken C. Byrum, created in 1958 an irrevocable trust to which he transferred shares of stock in three closely held corporations. Prior to transfer, he owned at least 71% of the outstanding stock of each corporation. The beneficiaries were his children or, in the event of their death before the termination of the trust, their surviving children. The trust instrument specified that there be a corporate trustee. Byrum designated as sole trustee an independent corporation, Huntington National Bank. The trust agreement vested

in the trustee broad and detailed powers with respect to the control and management of the trust property. These powers were exercisable in the trustee's sole discretion, subject to certain rights reserved by Byrum: (i) to vote the shares of unlisted stock held in the trust estate; (ii) to disapprove the sale or transfer of any trust assets, including the shares transferred to the trust; (iii) to approve investments and reinvestments; and (iv) to remove the trustee and "designate another corporate Trustee to serve as successor." Until the youngest living child reached age 21, the trustee was authorized in its "absolute and sole discretion" to pay the income and principal of the trust to or for the benefit of the beneficiaries, "with due regard to their individual needs for education, care, maintenance and support." After the youngest child reached 21, the trust was to be divided into a separate trust for each child, to terminate when the beneficiaries reached 35. The trustee was authorized in its discretion to pay income and principal from these trusts to the beneficiaries for emergency or other "worthy need," including education.[1]

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[1] The Trust Agreement in pertinent part provided:

"Article IV. Irrevocable Trust.

"This Trust shall be irrevocable and Grantor reserves no rights, powers, privileges or benefits either as to the Trust estate or the control or management of the trust property, except as set forth herein.

"Article V. Powers Of The Trustee.

"The Trustee shall have and possess and may exercise at all times not only the rights, powers and authorities incident to the office or required in the discharge of this trust, or impliedly conferred upon or vested in it, but there is hereby expressly conferred upon and vested in the Trustee all the rights, powers and authorities embodied in the following paragraphs in this Article, which are shown by way of illustration but not by way of limitation:

. . . . . .

"Sell. 5.02 To sell at public or private sale, to grant options to sell, to exchange, re-exchange or otherwise dispose of all or part of

When he died in 1964, Byrum owned less than 50% of the common stock in two of the corporations and 59% in the third. The trust had retained the shares

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the property, real or personal, at any time belonging to the Trust Estate, upon such terms and conditions and for such consideration as said Trustee shall determine, and to execute and deliver all instruments of sale or conveyance necessary or desirable therefor.

. . . . .

"Investments. 5.05 To invest any money in the Trust Estate in stocks, bonds, investment trusts, common trust funds and any other securities or property, real or personal, secured or unsecured, whether the obligations of individuals, corporations, trusts, associations, governments, expressly including shares and/or obligations of its own corporation, or otherwise, either within or outside of the State of Ohio, as the Trustee shall deem advisable, without any limitation whatsoever as to the character of investment under any statute or rule of law now or hereafter enacted or existing regarding trust funds or investments by fiduciaries or otherwise.

"Voting. 5.06 To vote by proxy or in person any stock or security comprising a part of the Trust Estate, at any meeting, except that, during Grantor's lifetime, all voting rights of any stocks which are not listed on a stock exchange, shall be exercised by Grantor, and after Grantor's death, the voting rights of such stocks shall be exercised by Grantor's wife during her lifetime.

. . . . .

"Leases. 5.09 To make leases for any length of time, whether longer or shorter than the duration of this Trust, to commence at the present time or in the future; to extend any lease; to grant options to lease or to renew any lease; it being expressly understood that the Trustee may grant or enter into ninety-nine year leases, renewable forever.

. . . . .

"Income Allocation. 5.13 To determine in its discretion how all receipts and disbursements, capital gains and losses, shall be charged, credited or apportioned between income and principal.

. . . . .

"Limitation. 5.15 Notwithstanding the powers of the Trustee granted in paragraphs 5.02, 5.05, 5.09 and 5.11 above, the Trustee shall not exercise any of the powers granted in said paragraphs unless (a) during Grantor's lifetime said Grantor shall approve of the action taken by the Trustee pursuant to said powers, (b) after the

transferred to it, with the result that Byrum had continued to have the right to vote not less than 71% of the common stock in each of the three corpora-

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death of the Grantor and as long as his wife, Marian A. Byrum, shall live, said wife shall approve of the action taken by the Trustee pursuant to said powers.

"Article VI. Distribution Prior To Age 21.

"Until my youngest living child reaches the age of twenty-one (21) years, the Trustee shall exercise absolute and sole discretion in paying or applying income and/or principal of the Trust to or for the benefit of Grantor's child or children and their issue, with due regard to their individual needs for education, care, maintenance and support and not necessarily in equal shares, per stirpes. The decision of the Trustee in the dispensing of Trust funds for such purposes shall be final and binding on all interested persons.

"Article VI. Division At Age 21.

. . . . .

"Principal Disbursements. 6.02 If prior to attaining the age of thirty-five (35), any one of the children of Grantor shall have an emergency such as an extended illness requiring unusual medical or hospital expenses, or any other worthy need including education of such child, the Trustee is hereby authorized and empowered to pay such child or use for his or her benefit such amounts of income and principal of the Trust as the Trustee in its sole judgment and discretion shall determine.

. . . . .

"Article VIII. Removal of Trustee.

"If the Trustee, The Huntington National Bank of Columbus, Columbus, Ohio, shall at any time change its name or combine with one or more corporations under one or more different names, or if its assets and business at any time shall be purchased and absorbed by another trust company or corporation authorized by law to accept these trusts, the new or successor corporation shall be considered as the said The Huntington National Bank of Columbus, Ohio, and shall continue said Trusts and succeed to all the rights, privileges, duties and obligations herein conferred upon said The Huntington National Bank of Columbus, Columbus, Ohio, Trustee.

"Grantor, prior to his death, and after the death of the Grantor, the Grantor's wife, Marian A. Byrum, during her lifetime, may remove or cause the removal of The Huntington National Bank of Columbus, Ohio, or any successor Trustee, as Trustee under the

tions.[2] There were minority stockholders, unrelated to Byrum, in each corporation.

Following Byrum's death, the Commissioner of Internal Revenue determined that the transferred stock was properly included within Byrum's gross estate under § 2036 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 2036 (a). That section provides for the inclusion in a decedent's gross estate of all property which the decedent has transferred by *inter vivos* transaction, if he has retained for his lifetime "(1) the possession or enjoyment of, or the right to the income from, the property" transferred, or "(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income

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Trusts and may thereupon designate another corporate Trustee to serve as successor Trustee hereunder.

"Article IX. Miscellaneous Provisions.

. . . . . .

"Discretion. 9.02 If in the opinion of the Trustee it shall appear that the total income of any beneficiary of any Trust fund created hereunder is insufficient for his or her proper or suitable support, care and comfort, and education and that of said beneficiary's children, the Trustee is authorized to pay to or for such beneficiary or child such additional amounts from the principal of the Trust Estate as it shall deem advisable in order to provide suitably and properly for the support, care, comfort, and education of said beneficiary and of said beneficiary's children, and the action of the Trustee in making such payments shall be binding on all persons."

[2] The actual proportions were:

	Percentage Owned by Decedent	Percentage Owned by Trust	Total Percentage Owned by Decedent and Trust
Byrum Lithographing Co., Inc.	59	12	71
Graphic Realty, Inc.	35	48	83
Bychrome Co.	42	46	88

therefrom." [3] The Commissioner determined that the stock transferred into the trust should be included in Byrum's gross estate because of the rights reserved by him in the trust agreement. It was asserted that his right to vote the transferred shares and to veto any sale thereof by the trustee, together with the ownership of other shares, enabled Byrum to retain the "enjoyment of . . . the property," and also allowed him to determine the flow of income to the trust and thereby "designate the persons who shall . . . enjoy . . . the income."

The executrix of Byrum's estate paid an additional tax of $13,202.45, and thereafter brought this refund action in District Court. The facts not being in dispute, the court ruled for the executrix on cross motions for summary judgment. 311 F. Supp. 892 (SD Ohio 1970). The Court of Appeals affirmed, one judge dissenting. 440 F. 2d 949 (CA6 1971). We granted the Government's petition for certiorari. 404 U. S. 937 (1971).

I

The Government relies primarily on its claim, made under § 2036 (a)(2), that Byrum retained the right to

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[3] 26 U. S. C. § 2036 provides:

"(a) General rule.

"The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

"(1) the possession or enjoyment of, or the right to the income from, the property, or

"(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom."

designate the persons who shall enjoy the income from the transferred property. The argument is a complicated one. By retaining voting control over the corporations whose stock was transferred, Byrum was in a position to select the corporate directors. He could retain this position by not selling the shares he owned and by vetoing any sale by the trustee of the transferred shares. These rights, it is said, gave him control over corporate dividend policy. By increasing, decreasing, or stopping dividends completely, it is argued that Byrum could "regulate the flow of income to the trust" and thereby shift or defer the beneficial enjoyment of trust income between the present beneficiaries and the remaindermen. The sum of this retained power is said to be tantamount to a grantor-trustee's power to accumulate income in the trust, which this Court has recognized constitutes the power to designate the persons who shall enjoy the income from transferred property.[4]

At the outset we observe that this Court has never held that trust property must be included in a settlor's gross estate solely because the settlor retained the power

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[4] *United States* v. *O'Malley*, 383 U. S. 627 (1966).

It is irrelevant to this argument how many shares Byrum transferred to the trust. Had he retained in his own name more than 50% of the shares (as he did with one corporation), rather than retaining the right to vote the transferred shares, he would still have had the right to elect the board of directors and the same power to "control" the flow of dividends. Thus, the Government is arguing that a majority shareholder's estate must be taxed for stock transferred to a trust if he owned at least 50% of the voting stock after the transfer or if he retained the right to vote the transferred stock and could thus vote more than 50% of the stock. It would follow also that if a settlor controlled 50% of the voting stock and similarly transferred some other class of stock for which the payment of dividends had to be authorized by the directors, his estate would also be taxed. Query: what would happen if he had the right to vote less than 50% of the voting stock but still "controlled" the corporation? See n. 10, *infra*.

to manage trust assets. On the contrary, since our decision in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339 (1929), it has been recognized that a settlor's retention of broad powers of management does not necessarily subject an *inter vivos* trust to the federal estate tax.[5] Although there was no statutory analogue to § 2036 (a)(2) when *Northern Trust* was decided, several lower court decisions decided after the enactment of the predecessor of § 2036 (a)(2) have upheld the settlor's right to exercise managerial powers without incurring estate-tax liability.[6] In *Estate of King* v. *Commissioner*, 37 T. C. 973 (1962), a settlor reserved the power to direct the trustee in the management and investment of trust assets. The Government argued that the settlor was thereby empowered to cause investments to be made in such a manner as to control significantly the flow of income into the trust. The Tax Court rejected this argument, and held for the taxpayer. Although the court recognized that the settlor had reserved "wide latitude in the exercise of his discretion as to the types of investments to be made," *id.*, at 980, it did not find this control over the flow of income to be equivalent

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[5] The Court has never overturned this ruling. See *McCormick* v. *Burnet*, 283 U. S. 784 (1931); *Helvering* v. *Duke*, 290 U. S. 591 (1933) (affirmed by an equally divided Court). In *Commissioner* v. *Estate of Church*, 335 U. S. 632 (1949), and *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701 (1949), the Court invited, *sua sponte*, argument of this question, but did not reach the issue in either opinion.

[6] See, *e. g.*, *Old Colony Trust Co.* v. *United States*, 423 F. 2d 601 (CA1 1970); *United States* v. *Powell*, 307 F. 2d 821 (CA10 1962); *Estate of Ford* v. *Commissioner*, 53 T. C. 114 (1969), aff'd, 450 F. 2d 878 (CA2 1971); *Estate of Wilson* v. *Commissioner*, 13 T. C. 869 (1949) (*en banc*), aff'd, 187 F. 2d 145 (CA3 1951); *Estate of Budd* v. *Commissioner*, 49 T. C. 468 (1968); *Estate of Pardee* v. *Commissioner*, 49 T. C. 140 (1967); *Estate of King* v. *Commissioner*, 37 T. C. 973 (1962).

to the power to designate who shall enjoy the income from the transferred property.

Essentially the power retained by Byrum is the same managerial power retained by the settlors in *Northern Trust* and in *King*. Although neither case controls this one—*Northern Trust*, because it was not decided under § 2036 (a)(2) or a predecessor; and *King*, because it is a lower court opinion—the existence of such precedents carries weight.[7] The holding of *Northern Trust*, that the settlor of a trust may retain broad powers of management without adverse estate-tax consequences, may have been relied upon in the drafting of hundreds of *inter vivos* trusts.[8] The modification of this principle now sought by the Government could have a seriously adverse impact, especially upon settlors (and their estates) who happen to have been "controlling" stock-

[7] The dissenting opinion attempts to distinguish the cases, holding that a settlor-trustee's retained powers of management do not bring adverse estate-tax consequences, on the ground that management of trust assets is not the same as the power retained by Byrum because a settlor-trustee is bound by a fiduciary duty to treat the life tenant beneficiaries and remaindermen as the trust instrument specifies. But the argument that in the reserved-power-of-management cases there was "a judicially enforceable strict standard capable of invocation by the trust beneficiaries by reference to the terms of the trust agreement," *post*, at 166, ignores the fact that trust agreements may and often do provide for the widest investment discretion.

[8] Assuming, *arguendo*, that MR. JUSTICE WHITE is correct in suggesting that in 1958, when this trust instrument was drawn, the estate-tax consequences of the settlor's retained powers of management were less certain than they are now, this Court's failure to overrule *Northern Trust*, plus the existence of recent cases such as *King* and the cases cited in n. 6, have undoubtedly been relied on by the draftsmen of more recent trusts with considerable justification. Our concern as to this point is not so much with whether Byrum properly relied on the precedents, but with the probability that others did rely thereon in good faith.

holders of a closely held corporation. Courts properly have been reluctant to depart from an interpretation of tax law which has been generally accepted when the departure could have potentially far-reaching consequences. When a principle of taxation requires reexamination, Congress is better equipped than a court to define precisely the type of conduct which results in tax consequences. When courts readily undertake such tasks, taxpayers may not rely with assurance on what appear to be established rules lest they be subsequently overturned. Legislative enactments, on the other hand, although not always free from ambiguity, at least afford the taxpayers advance warning.

The Government argues, however, that our opinion in *United States* v. *O'Malley,* 383 U. S. 627 (1966), compels the inclusion in Byrum's estate of the stock owned by the trust. In *O'Malley,* the settlor of an *inter vivos* trust named himself as one of the three trustees. The trust agreement authorized the trustees to pay income to the life beneficiary or to accumulate it as a part of the principal of the trust in their "sole discretion." The agreement further provided that net income retained by the trustees, and not distributed in any calendar year, " 'shall become a part of the principal of the Trust Estate.' " *Id.,* at 629 n. 2. The Court characterized the effect of the trust as follows:

> "Here Fabrice [the settlor] was empowered, with the other trustees, to distribute the trust income to the income beneficiaries or to accumulate it and add it to the principal, thereby denying to the beneficiaries the privilege of immediate enjoyment and conditioning their eventual enjoyment upon surviving the termination of the trust." *Id.,* at 631.

As the retention of this legal right by the settlor, acting as a trustee "in conjunction" with the other trustees,

came squarely within the language and intent of the predecessor of § 2036 (a)(2), the taxpayer conceded that the original assets transferred into the trust were includable in the decedent's gross estate. *Id.*, at 632. The issue before the Court was whether the accumulated income, which had been added to the principal pursuant to the reservation of right in that respect, was also includable in decedent's estate for tax purposes. The Court held that it was.

In our view, and for the purposes of this case, *O'Malley* adds nothing to the statute itself. The facts in that case were clearly within the ambit of what is now § 2036 (a). That section requires that the settlor must have "retained for his life . . . (2) the *right* . . . to designate the persons who shall possess or enjoy the property or the income therefrom." O'Malley was covered precisely by the statute for two reasons: (1) there the settlor had reserved a legal right, set forth in the trust instrument; and (2) this right expressly authorized the settlor, "in conjunction" with others, to accumulate income and thereby "to designate" the persons to enjoy it.

It must be conceded that Byrum reserved no such "right" in the trust instrument or otherwise. The term "right," certainly when used in a tax statute, must be given its normal and customary meaning. It connotes an ascertainable and legally enforceable power, such as that involved in *O'Malley*.[9] Here, the right ascribed to Byrum was the power to use his majority position and influence over the corporate directors to "regulate the flow of dividends" to the trust. That "right" was

[9] Although MR. JUSTICE WHITE's dissent argues that the use of the word "power" in *O'Malley* implies that the Court's concern was with practical reality rather than legal form, an examination of that opinion does not indicate that the term was used other than in the sense of *legally* empowered. At any rate, the "power" was a right reserved to the settlor in the trust instrument itself.

neither ascertainable nor legally enforceable and hence was not a right in any normal sense of that term.[10]

Byrum did retain the legal right to vote shares held by the trust and to veto investments and reinvestments. But the corporate trustee alone, not Byrum, had the right to pay out or withhold income and thereby to designate who among the beneficiaries enjoyed such income. Whatever power Byrum may have possessed with respect to the flow of income into the trust was derived not from an enforceable legal right specified in the trust instrument, but from the fact that he could elect a majority of the directors of the three corporations. The power to elect the directors conferred no legal right to command them to pay or not to pay dividends. A majority shareholder has a fiduciary duty not to misuse his power by promoting his personal interests at the expense of corporate interests.[11] Moreover,

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[10] The "control" rationale, urged by the Government and adopted by the dissenting opinion, would create a standard—not specified in the statute—so vague and amorphous as to be impossible of ascertainment in many instances. See n. 13, *infra*. Neither the Government nor the dissent sheds light on the absence of an ascertainable standard. The Government speaks vaguely of drawing the line between "an unimportant minority interest" (whatever that may be) and "voting control." The dissenting opinion does not address this problem at all. See Comment, Sale of Control Stock and the Brokers' Transaction Exemption—Before and After the Wheat Report, 49 Tex. L. Rev. 475, 479–481 (1971).

[11] Such a fiduciary relationship would exist in almost every, if not every, State. Ohio, from which this case arises, is no exception: "[I]f the majority undertakes, either directly or indirectly, through the directors, to conduct, manage, or direct the corporation's affairs, they must do so in good faith, and with an eye single to the best interests of the corporation. It is clear that the interests of the majority are not always identical with the interests of all the shareholders. The obligation of the majority or of the dominant group of shareholders acting for, or through, the corporation is fiduciary in nature. A court of equity will grant appropriate relief where the

the directors also have a fiduciary duty to promote the interests of the corporation.[12] However great Byrum's influence may have been with the corporate directors, their responsibilities were to all stockholders and were enforceable according to legal standards entirely unrelated to the needs of the trust or to Byrum's desires with respect thereto.

The Government seeks to equate the *de facto* position of a controlling stockholder with the legally enforceable "right" specified by the statute. Retention of corporate control (through the right to vote the shares) is said to be "tantamount to the power to accumulate income" in the trust which resulted in estate-tax consequences in *O'Malley*. The Government goes on to assert that "[t]hrough exercise of that retained power, [Byrum] could increase or decrease corporate dividends . . . and thereby shift or defer the beneficial enjoyment of trust income." [13] This approach seems to us

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majority or dominant group of shareholders act in their own interest or in the interest of others so as to oppress the minority or commit a fraud upon their rights." 13 Ohio Jur. 2d, Corporations § 662, pp. 90–91 (footnotes omitted).

See *Overfield* v. *Pennroad Corp.*, 42 F. Supp. 586 (ED Pa. 1941), rev'd on other grounds, 146 F. 2d 889 (CA3 1944).

[12] "The directors of the corporation represent the corporation, not just one segment of it, but all of it. The fiduciary nature of the directors' obligation requires that, in the management of the corporation's affairs, they do not presume to play favorites among the shareholders or among classes of shareholders." 12 Ohio Jur. 2d, Corporations § 497, p. 618.

[13] The Government uses the terms "control" and "controlling stockholder" as if they were words of art with a fixed and ascertainable meaning. In fact, the concept of "control" is a nebulous one. Although in this case Byrum possessed "voting control" of the three corporations (in view of his being able to vote more than 50% of the stock in each), the concept is too variable and imprecise to constitute the basis *per se* for imposing tax liability under § 2036 (a). Under most circumstances, a stockholder who has the right to vote

not only to depart from the specific statutory language,[14] but also to misconceive the realities of corporate life.

There is no reason to suppose that the three corporations controlled by Byrum were other than typical small businesses. The customary vicissitudes of such enterprises—bad years; product obsolescence; new competition; disastrous litigation; new, inhibiting Government regulations; even bankruptcy—prevent any certainty or predictability as to earnings or dividends. There is no assurance that a small corporation will have a flow of net earnings or that income earned will in fact be available for dividends. Thus, Byrum's alleged *de facto* "power to

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more than 50% of the voting shares of a corporation "controls it" in the sense that he may elect the board of directors. But such a stockholder would not control, under the laws of most States, certain corporate transactions such as mergers and sales of assets. Moreover, control—in terms of effective power to elect the board under normal circumstances—may exist where there is a right to vote far less than 50% of the shares. This will vary with the size of the corporation, the number of shareholders, and the concentration (or lack of it) of ownership. See generally 2 L. Loss, Securities Regulation 770–783 (1961). Securities law practitioners recognize that possessing 10% or more of voting power is a factor on which the Securities and Exchange Commission relies as one of the indicia of control. SEC, Disclosure to Investors—The Wheat Report 245–247 (1969).

[14] In advocating this *de facto* approach, the Government relies on our opinion in *Commissioner* v. *Sunnen*, 333 U. S. 591 (1948). *Sunnen* was a personal income tax case in which the Court found the taxpayer had made an assignment of income. The reasoning relied on the *de facto* power of a controlling shareholder to regulate corporate business for his personal objectives. This case is an estate tax case, not an income tax case. Moreover, unlike assignment-of-income cases, in which the issue is who has the power over income, this case concerns a statute written in terms of the "right" to designate the recipient of income. The use of the term "right" implies that restraints on the exercise of power are to be recognized and that such restraints deprive the person exercising the power of a "right" to do so.

control the flow of dividends" to the trust was subject to business and economic variables over which he had little or no control.

Even where there are corporate earnings, the legal power to declare dividends is vested solely in the corporate board. In making decisions with respect to dividends, the board must consider a number of factors. It must balance the expectation of stockholders to reasonable dividends when earned against corporate needs for retention of earnings. The first responsibility of the board is to safeguard corporate financial viability for the long term. This means, among other things, the retention of sufficient earnings to assure adequate working capital as well as resources for retirement of debt, for replacement and modernization of plant and equipment, and for growth and expansion. The nature of a corporation's business, as well as the policies and long-range plans of management, are also relevant to dividend payment decisions.[15] Directors of a closely held, small corporation must bear in mind the relatively limited access of such an enterprise to capital markets. This may require a more conservative policy with respect to dividends than would be expected of an established corporation with securities listed on national exchanges.[16]

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[15] The spectrum of types of corporate businesses, and of permissible policies with respect to the retention of earnings, is broad indeed. It ranges from the public utility with relatively assured and stable income to the new and speculative corporation engaged in a cyclical business or organized to exploit a new patent or unproved technology. Some corporations pay no dividends at all, as they are organized merely to hold static assets for prolonged periods (*e. g.*, land, mineral resources, and the like). Corporations which emphasize growth tend to low dividend payments, whereas mature corporations may pursue generous dividend policies.

[16] *Thomas* v. *Matthews*, 94 Ohio St. 32, 55–56, 113 N. E. 669, 675 (1916):

"[I]t is the duty of the directors, in determining the amount of net earnings available for the payment of dividends, to take into

Nor do small corporations have the flexibility or the opportunity available to national concerns in the utilization of retained earnings. When earnings are substantial, a decision not to pay dividends may result only in the accumulation of surplus rather than growth through internal or external expansion. The accumulated earnings may result in the imposition of a penalty tax.[17]

These various economic considerations are ignored at the directors' peril. Although vested with broad discretion in determining whether, when, and what amount of dividends shall be paid, that discretion is subject to legal restraints. If, in obedience to the will of the majority stockholder, corporate directors disregard the interests of shareholders by accumulating earnings to an unreasonable extent, they are vulnerable to a derivative suit.[18] They are similarly vulnerable if they make an unlawful payment of dividends in the absence of net earnings or available surplus,[19] or if they fail to exer-

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account the needs of the company in its business and sums necessary in the operation of its business until the income from further operations is available, the amount of its debts, the necessity or advisability of paying its debts or at least reducing them within the limits of the company's credit, the preservation of its capital stock as represented in the assets of the company as a fund for the protection of its creditors and the character of its surplus assets, whether cash, credits or merchandise."

[17] Internal Revenue Code of 1954, Subc. G, pt. I, §§ 531–537, 26 U. S. C. §§ 531–537.

[18] Had Byrum caused the board to follow a dividend policy, designed to mininize or cut off income to the trust, which resulted in the imposition of the penalty for accumulated earnings not distributed to shareholders, there might have been substantial grounds for a derivative suit. A derivative suit also would have been a possibility had dividends been paid imprudently to increase the trust's income at the expense of corporate liquidity. Minority shareholders in Ohio may bring derivative suits under Ohio Rule Civ. Proc. 23.1.

[19] In most States, the power to declare dividends is vested solely in the directors. 11 W. Fletcher, Cyclopedia Corporations, c. 58, § 5320. Ohio is no exception, and it limits the authority of directors to pay

cise the requisite degree of care in discharging their duty to act only in the best interest of the corporation and its stockholders.

Byrum was similarly inhibited by a fiduciary duty from abusing his position as majority shareholder for personal or family advantage to the detriment of the corporation or other stockholders. There were a substantial number of minority stockholders in these corporations who were unrelated to Byrum.[20] Had Byrum and the directors violated their duties, the minority shareholders would have had a cause of action under Ohio law.[21] The Huntington National Bank, as trustee, was one of the minority stockholders, and it had both the right and the duty to hold Byrum responsible for any wrongful or negligent action as a controlling stockholder or as a director of the corporations.[22] Although Byrum had reserved the right to remove the trustee, he would have been imprudent to do this when confronted by the

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dividends depending on available corporate surplus. Ohio Rev. Code Ann. § 1701.33. Although liability generally exists irrespective of a statute, nearly all States have statutes regulating the liability of directors who participate in the payment of improper dividends. 12 Fletcher, *supra*, c. 58, § 5432. Again, Ohio is no exception. Ohio Rev. Code Ann. § 1701.95.

[20] App. 30–32. In Byrum Lithographing Co., Inc, none of the other 11 stockholders appears to be related by name to Byrum. In Bychrome Co. five of the eight stockholders appear to be unrelated to the Byrums; and in Graphic Realty Co. 11 of the 14 stockholders appear to be unrelated.

[21] See *Wilberding* v. *Miller*, 90 Ohio St. 28, 42, 106 N. E. 665, 669 (1914):

"An arbitrary disregard of the rights of stockholders to dividends or other improper treatment of the assets of the company would be relieved against."

[22] The trust instrument explicitly granted the trustee the power "[t]o enforce, abandon, defend against, or have adjudicated by legal proceedings, arbitration or by compromise, any claim or demand whatsoever arising out of or which may exist against the Trust Estate." App. 10–11.

trustee's complaint against his conduct. A successor trustee would succeed to the rights of the one removed.

We conclude that Byrum did not have an unconstrained *de facto* power to regulate the flow of dividends to the trust, much less the "right" to designate who was to enjoy the income from trust property. His ability to affect, but not control, trust income, was a qualitatively different power from that of the settlor in *O'Malley,* who had a specific and enforceable right to control the income paid to the beneficiaries.[23] Even had Byrum managed to flood the trust with income, he had no way of compelling the trustee to pay it out rather than accumulate it. Nor could he prevent the trustee from making payments from other trust assets,[24] although admittedly there were few of these at the time of Byrum's death. We cannot assume, however, that no other assets would come into the trust from reinvestments or other gifts.[25]

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[23] The Government cites two other opinions of this Court, in addition to *O'Malley,* to support its argument. In both *Commissioner* v. *Estate of Holmes,* 326 U. S. 480 (1946), and *Lober* v. *United States,* 346 U. S. 335 (1953), the grantor reserved to himself the power to distribute to the beneficiaries the entire principal and accumulated income of the trust at any time. This power to terminate the trust and thereby designate the beneficiaries at a time selected by the settlor, is not comparable to the powers reserved by Byrum in this case.

[24] While the trustee could not acquire or dispose of investments without Byrum's approval, he was not subject to Byrum's orders. Byrum could prevent the acquisition of an asset, but he could not require the trustee to acquire any investment. Nor could he compel a sale, although he could prevent one. Thus, if there were other income-producing assets in the trust, Byrum could not compel the trustee to dispose of them.

[25] In purporting to summarize the basis of our distinction of *O'Malley,* the dissenting opinion states:

"Now the majority would have us accept the incompatible position that a settlor seeking tax exemption may keep the power of income

We find no merit to the Government's contention that Byrum's *de facto* "control," subject as it was to the economic and legal constraints set forth above, was tantamount to the right to designate the persons who shall enjoy trust income, specified by § 2036 (a)(2).[26]

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allocation by rendering the trust dependent on an income flow he controls because the general fiduciary obligations of a director are sufficient to eliminate the power to designate within the meaning of § 2036 (a)(2)." *Post*, at 157.

This statement, which assumes the critical and ultimate conclusion, incorrectly states the position of the Court. We do not hold that a settlor "may keep the power of income allocation" in the way MR. JUSTICE WHITE sets out; we hold, for the reasons stated in this opinion, that this settlor did not retain the power to allocate income within the meaning of the statute.

[26] The dissenting opinion's view of the business world will come as a surprise to many. The dissent states:

"Thus, by instructing the directors he elected in the controlled corporations that he thought dividends should or should not be declared Byrum was able to open or close the spigot through which the income flowed to the trust's life tenants." *Post*, at 152.

This appears to assume that all corporations, including the small family type involved in this case, have a regular and dependable flow of earnings available for dividends, and that if there is a controlling stockholder he simply turns the "spigot" on or off as dividends may be desired. For the reasons set forth in this opinion, no such dream world exists in the life of many corporations. But whatever the situation may be generally, the fallacy in the dissenting opinion's position here is that the record simply does not support it. This case was decided on a motion for summary judgment. The record does not disclose anything with respect to the earnings or financial conditions of these corporations. We simply do not know whether there were any earnings for the years in question, whether there was an earned surplus in any of the corporations, or whether—if some earnings be assumed—they were adequate in light of other corporate needs to justify dividend payments. Nor can we infer from the increase in dividend payments in the year following Byrum's death that higher dividends could have been paid previously. The increase could be explained as easily by insurance held by the corporations on Byrum's life.

II

The Government asserts an alternative ground for including the shares transferred to the trust within Byrum's gross estate. It argues that by retaining control, Byrum guaranteed himself continued employment and remuneration, as well as the right to determine whether and when the corporations would be liquidated or merged. Byrum is thus said to have retained "the . . . enjoyment of . . . the property" making it includable within his gross estate under § 2036 (a)(1). The Government concedes that the retention of the voting rights of an "unimportant minority interest" would not require inclusion of the transferred shares under § 2036 (a)(1). It argues, however, "where the cumulative effect of the retained powers and the rights flowing from the shares not placed in trust leaves the grantor in control of a close corporation, and assures that control for his lifetime, he has retained the 'enjoyment' of the transferred stock." [27] Brief for United States 23.

It is well settled that the terms "enjoy" and "enjoyment," as used in various estate tax statutes, "are not terms of art, but connote substantial present economic benefit rather than technical vesting of title or estates." *Commissioner* v. *Estate of Holmes,* 326 U. S. 480, 486

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[27] At one point MR. JUSTICE WHITE seems to imply that Byrum also retained the enjoyment of the right to the income from the transferred shares:

"When Byrum closed the spigot by deferring dividends of the controlled corporations, *thereby perpetuating his own 'enjoyment' of these funds,* he also in effect transferred income from the life tenants to the remaindermen." (Emphasis added.) *Post,* at 152.

But, of course, even if dividends were deferred, the funds remained in the corporation; Byrum could not use them himself.

(1946).[28] For example, in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339 (1929), in which the critical inquiry was whether the decedent had created a trust "intended . . . 'to take effect in possession or enjoyment at or after his death,' " [29] *id.*, at 348, the Court held that reserved powers of management of trust assets, similar to Byrum's power over the three corporations, did not subject an *inter vivos* trust to the federal estate tax. In determining whether the settlor had retained the enjoyment of the transferred property, the Court said:

> "Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation

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[28] See 26 CFR § 20.2036-1 (b)(2):

"The 'use, possession, right to the income, or other enjoyment of the transferred property' is considered as having been retained by or reserved to the decedent to the extent that the use, possession, right to the income, or other enjoyment is to be applied toward the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit."

Although MR. JUSTICE WHITE questions the Court's failure to interpret "possession or enjoyment" with "extreme literalness," *post*, at 154 n. 3, apparently the Commissioner does not do so either. Reflection on the expansive nature of those words, particularly "enjoyment," will demonstrate why interpreting them with "extreme literalness" is an impossibility.

[29] *Northern Trust* was decided under the Revenue Act of 1921, § 402 (c), 42 Stat. 278.

> of death, the reserved powers do not serve to distinguish them from any other gift *inter vivos* not subject to the tax." 278 U. S., at 346–347.

The cases cited by the Government reveal that the terms "possession" and "enjoyment," used in § 2036 (a) (1), were used to deal with situations in which the owner of property divested himself of title but retained an income interest or, in the case of real property, the lifetime use of the property. Mr. Justice Black's opinion for the Court in *Commissioner* v. *Estate of Church,* 335 U. S. 632 (1949), traces the history of the concept. In none of the cases cited by the Government has a court held that a person has retained possession or enjoyment of the property if he has transferred title irrevocably, made complete delivery of the property and relinquished the right to income where the property is income producing.[30]

The Government cites only one case, *Estate of Holland* v. *Commissioner,* 1 T. C. 564 (1943),[31] in which a decedent had retained the right to vote transferred shares of stock and in which the stock was included

[30] *Helvering* v. *Hallock,* 309 U. S. 106 (1940); *Commissioner* v. *Estate of Church,* 335 U. S. 632 (1949); *Lober* v. *United States,* 346 U. S. 335 (1953); *United States* v. *Estate of Grace,* 395 U. S. 316 (1969); *Estate of McNichol* v. *Commissioner,* 265 F. 2d 667 (CA3), cert. denied, 361 U. S. 829 (1959); *Guynn* v. *United States,* 437 F. 2d 1148 (CA4 1971). In all of these cases, as in *Church,* the grantor retained either title or an income interest or the right to use real property for his lifetime.

Despite MR. JUSTICE WHITE's suggestion, *post,* at 154, we have not "ignore[d] the plain language of the statute which proscribes 'enjoyment' as well as 'possession or . . . the right to income.'" Rather, the cases we have cited clearly establish that the terms "possession" and "enjoyment" have never been used as the dissent argues.

[31] The cited opinion supplemented an earlier opinion of the Board of Tax Appeals in the same case, 47 B. T. A. 807 (1942).

within the decedent's gross estate. In that case, it was not the mere power to vote the stock, giving the decedent control of the corporation, which caused the Tax Court to include the shares. The court held that " 'on an inclusive view of the whole arrangement, this withholding of the income until decedent's death, coupled with the retention of the certificates under the pledge and the reservation of the right to vote the stock and to designate the company officers' " subjects the stock to inclusion within the gross estate. *Id.*, at 565. The settlor in *Holland* retained a considerably greater interest than Byrum retained, including an income interest.[32]

As the Government concedes, the mere retention of the right-to-vote shares does not constitute the type of "enjoyment" in the property itself contemplated by § 2036 (a)(1). In addition to being against the weight of precedent, the Government's argument that Byrum *retained* "enjoyment" within the meaning of § 2036 (a)(1) is conceptually unsound. This argument implies, as it must under the express language of § 2036 (a), that Byrum "retained for his life . . . (1) the possession or enjoyment" of the *"property"* transferred to the trust or the *"income"* therefrom. The only property he transferred was corporate stock. He did not transfer "control" (in the sense used by the Government) as the trust never owned as much as 50% of the stock of any corporation. Byrum never divested himself of control, as he was able to vote a majority of the shares by virtue of what he owned and the right to vote those placed in

[32] A more analogous case is *Yeazel* v. *Coyle*, 68-1 U. S. T. C. ¶ 12,524 (ND Ill. 1968), in which a settlor-trustee, who transferred 60% of the shares of a wholly owned corporation to a trust, was found not to have retained the enjoyment of the property for her lifetime.

the trust. Indeed, at the time of his death he still owned a majority of the shares in the largest of the corporations and probably would have exercised control of the other two by virtue of being a large stockholder in each.[33] The statutory language plainly contemplates retention of an attribute of the property transferred—such as a right to income, use of the property itself, or a power of appointment with respect either to income or principal.[34]

Even if Byrum had transferred a majority of the stock, but had retained voting control, he would not have retained "substantial present economic benefit," 326 U. S., at 486. The Government points to the retention of two "benefits." The first of these, the power to liquidate or

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[33] The Government, for the reasons discussed in n. 4, *supra*, makes no distinction between retention of control by virtue of owning 50% or more of the voting shares and such retention by a combination of stock owned and that with respect to which the right to vote was retained.

[34] The interpretation given § 2036 (a) by the Government and by MR. JUSTICE WHITE's dissenting opinion would seriously disadvantage settlors in a control posture. If the settlor remained a controlling stockholder, any transfer of stock would be taxable to his estate. See n. 4, *supra*. The typical closely held corporation is small, has a checkered earning record, and has no market for its shares. Yet its shares often have substantial asset value. To prevent the crippling liquidity problem that would result from the imposition of estate taxes on such shares, the controlling shareholder's estate planning often includes an irrevocable trust. The Government and the dissenting opinion would deny to controlling shareholders the privilege of using this generally acceptable method of estate planning without adverse tax consequences. Yet a settlor whose wealth consisted of listed securities of corporations he did not control would be permitted the tax advantage of the irrevocable trust even though his more marketable assets present a far less serious liquidity problem. The language of the statute does not support such a result and we cannot believe Congress intended it to have such discriminatory and far-reaching impact.

merge, is not a *present* benefit; rather, it is a speculative and contingent benefit which may or may not be realized. Nor is the probability of continued employment and compensation the substantial "enjoyment of . . . [the transferred] property" within the meaning of the statute. The dominant stockholder in a closely held corporation, if he is active and productive, is likely to hold a senior position and to enjoy the advantage of a significant voice in his own compensation. These are inevitable facts of the free-enterprise system, but the influence and capability of a controlling stockholder to favor himself are not without constraints. Where there are minority stockholders, as in this case, directors may be held accountable if their employment, compensation, and retention of officers violate their duty to act reasonably in the best interest of the corporation and all of its stockholders.[35] Moreover, this duty is policed, albeit indirectly, by the Internal Revenue Service, which disallows the deduction of unreasonable compensation paid to a corporate executive as a business expense.[36] We conclude that Byrum's retention of voting control was not the retention of the enjoyment of the transferred property within the meaning of the statute.

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[35] Directors of Ohio corporations have been held liable for payment of excessive compensation. *Berkwitz* v. *Humphrey,* 163 F. Supp. 78 (ND Ohio 1958).

[36] 26 U. S. C. § 162 (a)(1) permits corporations to deduct "reasonable" compensation as business expenses. If the Internal Revenue Service determines that compensation exceeds the bounds of reason, it will not permit a deduction. See, *e. g., Botany Worsted Mills* v. *United States,* 278 U. S. 282 (1929).

Moreover, there is nothing in the record of this case with respect to Byrum's compensation. There is no showing that his control of these corporations gave him an "enjoyment" with respect to compensation that he would not have had upon rendering similar services without owning any stock.

For the reasons set forth above, we hold that this case was correctly decided by the Court of Appeals and accordingly the judgment is

Affirmed.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN join, dissenting.

I think the majority is wrong in all substantial respects.

I

The tax code commands the payment of an estate tax on transfers effective in name and form during life if the now deceased settlor retained during his life either (1) "the possession or enjoyment of" the property transferred or (2) the right to designate the persons who would enjoy the transferred property or the income therefrom. 26 U. S. C. §§ 2036 (a)(1) and (2). Our cases explicate this congressional directive to mean that if one wishes to avoid a tax at death he must be self-abnegating enough to totally surrender his property interest during life.

> "[A]n estate tax cannot be avoided by any trust transfer except by a bona fide transfer in which the settlor, absolutely, unequivocally, irrevocably, and without possible reservations, parts with all of his title and all of his possession and all of his enjoyment of the transferred property." *Commissioner* v. *Estate of Church*, 335 U. S. 632, 645 (1949).

In this case the taxpayer's asserted alienation does not measure up to this high standard. Byrum enjoyed the continued privilege of voting the shares he "gave up" to the trust. By means of these shares he enjoyed majority control of two corporations. He used that control to retain salaried positions in both corporations. To my

mind this is enjoyment of property put beyond taxation only on the pretext that it is not enjoyed.

Byrum's lifelong enjoyment of the voting power of the trust shares contravenes § 2036 (a)(2) as well as § 2036 (a)(1) because it afforded him control over which trust beneficiaries--the life tenants or the remaindermen—would receive the benefit of the income earned by these shares. He secured this power by making the trust to all intents and purposes exclusively dependent on shares it could not sell in corporations he controlled.[1] Thus, by instructing the directors he elected in the controlled corporations that he thought dividends should or should not be declared Byrum was able to open or close the spigot through which income flowed to the trust's life tenants. When Byrum closed the spigot by deferring dividends of the controlled corporations, thereby perpetuating his own "enjoyment" of these funds, he also in effect transferred income from the life tenants to the remaindermen whose share values were swollen by the retained income. The extent to which such income transfers can be effected is suggested by the pay-out record of the corporations here in question, as reflected in the trust's accounts. Over the first five years of its existence on shares later valued by the Internal Revenue Service at $89,000, the trust received a *total* of only $339 in dividends. In the sixth year, Byrum died. The corporations raised their dividend rate from 10¢ a share to $2 per share and paid $1,498 into the trust. See "Income Cash Ledger," App. 25–26.

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[1] The trust held $89,000 worth of stock in Byrum-controlled corporations and only one other asset: three Series E United States Savings Bonds worth a total of $300 at maturity. See "Yearly List of [Trust] Assets," App. 27–29. Consequently, I do not accord much weight to the majority's point that Byrum could not prevent the trustee from making payments "from other trust assets."

Byrum's control over the flow of trust income renders his estate scheme repugnant to § 2036 (a)(2) as well as § 2036 (a)(1).

To me it is thus clear that Byrum's shares were not truly, totally, "absolutely, unequivocally" alienated during his life. When it is apparent that, if tolerated, Byrum's scheme will open a gaping hole in the estate tax laws, on what basis does the majority nonetheless conclude that Byrum should have his enjoyment, his control, and his estate free from taxes?

II

I can find nothing in the majority's three arguments purporting to deal with § 2036 (a)(1), that might justify the conclusion that Byrum did not "enjoy" a benefit from the shares his estate now asserts are immune from taxation.

1. The majority says that in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339 (1929), "the Court held that reserved powers of management of trust assets, similar to Byrum's power over the three corporations, did not subject an *inter vivos* trust to the federal estate tax." This reading of *Northern Trust* is not warranted by the one paragraph in that antique opinion on the point for which it is now cited, see 278 U. S., at 346–347, nor by the circumstances of that case. No one has ever suggested that Adolphus Bartlett, the settlor in *Northern Trust,* used or could have used the voting power of the shares he transferred to a trust to control or, indeed, exercise any significant influence in any company. A mere glance at the nature of these securities transferred by Bartlett (*e. g.,* 1,000 shares of the Northern Trust Co., 784 shares of the Commonwealth Edison Co., 300 shares of the Illinois Central R. Co., 200 preferred shares of the Chicago & North Western R. Co., 300 common shares of the Chicago &

North Western R. Co.)[2] shatters any theory that might lead one to believe that the Court in *Northern Trust* was concerned with anything like the transactions in this case. On what basis, then, does the majority say that *Northern Trust* involved a decision on facts "similar to Byrum's power over the three corporations"? And on what basis does it say that the Government's position that Byrum's use of trust shares to retain control renders those shares taxable is "against the weight of precedent?"

2. The majority implies that trust securities are taxable only if the testator retained title or the right to income from the securities until death. But this ignores the plain language of the statute which proscribes "enjoyment" as well as "possession or . . . the right to income."

3. The majority concludes with the assertion that Byrum secured no "substantial present economic benefits" from his retention of control.[3] It is suggested that con-

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[2] Transcript of Record 3, in No. 90, O. T. 1928, *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339 (1929).

[3] I am constrained to note that nowhere in the statute (which the majority elsewhere in its argument would read with extreme literalness) do the words "substantial" and "present"—or suggestions to that effect—appear. The phrase "substantial present economic benefit" does appear in *Commissioner* v. *Estate of Holmes*, 326 U. S. 480, 486 (1946), from which it is quoted by the majority. But there the Court held Holmes' estate liable to taxation on the corpus of an irrevocable trust because the settlor (Holmes) had kept the power for himself as trustee to distribute or retain trust income at his discretion. The Court held that this power enabled the settlor to retard or accelerate the beneficiaries' "enjoyment" at his whim. The donor had thus kept "so strong a hold over the actual and immediate enjoyment of what he [allegedly had put] beyond his own power" that he could not be said to have "divested himself of that degree of control which [a provision analogous to § 2036 (a)(2)] requires in order to avoid the tax." 326 U. S., at 487. *Holmes* is thus strong precedent contrary to the majority's § 2036 (a)(2) argument. See also *Lober* v. *United States*, 346 U. S. 335 (1953); it certainly is not a case in

trol is not important, that it either cannot be held by a private shareholder or that it is of so little use and relevance the taxpayer can hardly be said to have "enjoyed" it. This view of corporate life is refuted by the case law;[4] by the commentators;[5] and by everyday transactions on the stock exchange where offers and trades repeatedly demonstrate that the power to "control" a corporation will fetch a substantial premium.[6] Moreover, the majority's view is belied by Byrum's own conduct. He obviously valued control because he forbade the bank that served as trustee to sell the trust shares in these corporations without his—Byrum's—approval, whatever their return, their prospects, their value, or the trust's needs. Trust Agreement ¶ 5.15, App. 14.

In sum, the majority's discourse on § 2036 (a)(1) is an unconvincing rationalization for allowing Byrum the tax-free "enjoyment" of the control privileges he retained through the voting power of shares he supposedly "absolutely" and "unequivocally" gave up.

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which the Court intended or attempted to narrow the meaning of § 2036 (a)(1).

[4] See, *e. g.*, *Honigman* v. *Green Giant Co.*, 208 F. Supp. 754, aff'd, 309 F. 2d 667 (CA8 1962), cert. denied, 372 U. S. 941 (1963); *Essex Universal Corp.* v. *Yates*, 305 F. 2d 572 (CA2 1962); *Perlman* v. *Feldmann*, 219 F. 2d 173 (CA2 1955).

[5] "[S]hareholders in a close corporation are usually vitally interested in maintaining their proportionate control . . . ." 1 F. O'Neal, Close Corporations § 3.39, p. 43 (1971). At least since *Perlman* v. *Feldmann*, *supra*, the academic dispute has not been over the existence of control, or its value, but, rather, over who is to benefit from the premium received upon its sale. See Leech, Transactions in Corporate Control, 104 U. Pa. L. Rev. 725 (1956); Hill, The Sale of Controlling Shares, 70 Harv. L. Rev. 986 (1957); Bayne, The Sale-of-Control Premium: The Disposition, 57 Calif. L. Rev. 615 (1969); Bayne, The Noninvestment Value of Control Stock, 45 Ind. L. J. 317 (1970).

[6] See, *e. g.*, the transactions described in Bayne, *supra*, n. 5, at 617.

III

I find no greater substance in the greater length of the majority's discussion of § 2036 (a)(2).

A

Approaching the § 2036 (a)(2) problem afresh, one would think *United States* v. *O'Malley*, 383 U. S. 627 (1966), would control this case. In *O'Malley* the settlor "had relinquished all of his rights" to stock, but he appointed himself one of three trustees for each of the five trusts he created, and he drafted the trust agreement so that the trustees had the freedom to allocate trust income to the life tenant or to accumulate it for the remainderman "in their sole discretion." The District Court held that the value of securities transferred was includable in the settlor's gross estate under § 811 (c) and (d) of the Internal Revenue Code of 1939, as amended, § 811 (c)(1)(B) being the similarly worded predecessor of § 2036 (a), because the settlor had retained the power to allocate income between the beneficiaries without being constrained by a "definite ascertainable standard" according to which the trust would be administered. *O'Malley* v. *United States*, 220 F. Supp. 30, 33 (1963). The court noted "plaintiff's contention that the required external standard is imposed generally by the law of Illinois," but found this point to be "without merit."

> "The cases cited by plaintiff clearly set out fundamental principles of trust law: that a trust requires a named beneficiary; that the legal and equitable estates be separated; and, that the trustees owe a fiduciary duty to the beneficiaries. These statements of the law are not particular to Illinois. Nor do these requirements so circumscribe the trustee's powers in an otherwise unrestricted trust so as to hold such a trust governed by an external standard

and thus excludable from the application of § 811 (c) and (d)." 220 F. Supp., at 33–34.

It was another aspect of that case that brought the matter to the Court of Appeals, 340 F. 2d 930 (CA7 1964), and then here. We were asked to decide whether the lower court's holding should be extended and the accumulated income as well as the principal of the trust included in the settlor's taxable estate because the settlor had retained excessive power to designate the income beneficiaries of the shares transferred. We held that, though capable of exercise only in conjunction with one other trustee, the power to allocate income without greater constraint than that imposed "is a significant power . . . of sufficient substance to be deemed the power to 'designate' within the meaning of [the predecessor of § 2036 (a)(2)]." 383 U. S., at 631.

O'Malley makes the majority's position in this case untenable. *O'Malley* establishes that a settlor serving as a trustee is barred from retaining the power to allocate trust income between a life tenant and a remainderman if he is not constrained by more than general fiduciary requirements. See also *Commissioner* v. *Estate of Holmes*, 326 U. S. 480 (1946),[7] and *Lober* v. *United States*, 346 U. S. 335 (1953). Now the majority would have us accept the incompatible position that a settlor seeking tax exemption may keep the power of income allocation by rendering the trust dependent on an income flow he controls because the general fiduciary obligations of a director are sufficient to eliminate the power to designate within the meaning of § 2036 (a)(2).[8]

[7] See n. 3, *supra*.

[8] This incompatibility was readily perceived by the Internal Revenue Service. Shortly after *O'Malley* was handed down, it promulgated Rev. Rul. 67-54 (1967) which concluded:

"Where a decedent transfers nonvoting stock in trust and holds for the remainder of his life voting stock giving him control over the divi-

B

The majority would prop up its untenable position by suggesting that a controlling shareholder is constrained in his distribution or retention of dividends by fear of derivative suits, accumulated earnings taxes, and "various economic considerations . . . ignored at the director's peril." I do not deny the existence of such constraints, but their restraining effect on an otherwise tempting gross abuse of the corporate dividend power hardly guts the great power of a controlling director to accelerate or retard, enlarge or diminish, most dividends. The penalty taxes only take effect when accumulations exceed $100,000, 26 U. S. C. § 535 (c); Byrum was free to accumulate up to that ceiling. The threat of a derivative suit is hardly a greater deterrent to accumulation. As Cary puts it:

> "The cases in which courts have refused to require declaration of dividends or larger dividends despite the existence of current earnings or a substantial surplus or both are numerous; plaintiffs have won only a small minority of the cases. The labels are 'business judgment'; 'business purpose'; 'non-inter-

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dend policy of the corporation, he has retained, for a period which did not in fact end before his death, the right to determine the income from the nonvoting stock. If he also retains control over the disposition of the nonvoting stock, whether as trustee, by restriction upon the trustee, or alone or in conjunction with another, he has in fact made a transfer whereby he has retained for his life the right to designate the persons who shall possess or enjoy the transferred property or the income therefrom. Since under section 20.2036-1 (b)(3) of the Estate Tax Regulations it is immaterial in what capacity a power was exercisable by the decedent, it is sufficient that the power was exercisable in the capacity of controlling stockholder. Under the facts of this case, therefore, the decedent has made a transfer with a reserved power within the meaning of section 2036 (a) of the Code."

> ference in internal affairs.' The courts have accepted the general defense of discretion, supplemented by one or more of a number of grounds put forward as reasons for not paying dividends or larger dividends . . . ." W. Cary, Cases and Materials on Corporations 1587 (4th ed. 1969).

And cf. *Commissioner* v. *Sunnen*, 333 U. S. 591, 609 (1948).

The ease with which excess taxes, derivative suits, and economic vicissitudes alike may be circumvented or hurdled if a controlling shareholder chooses to so arrange his affairs is suggested by the pay-out record of Byrum's corporations noted above.

C

The majority proposes one other method of distinguishing *O'Malley*. Section 2036 (a)(2), it is said, speaks of the *right* to designate income beneficiaries. *O'Malley* involved the effort of a settlor to maintain a legal right to allocate income. In the instant case only the *power* to allocate income is at stake. The Government's argument is thus said to depart from "the specific statutory language" [9] and to stretch the statute beyond endurance by allocating tax according to the realities of the situation rather than by the more rigid yardstick of formal control.[10]

This argument conjures up an image of congressional care in the articulation of § 2036 (a)(2) that is entirely at odds with the circumstances of its passage. The 1931 legislation, which first enacted what is now § 2036 (a)(2) in language not materially amended since that date,

[9] This call for literalness strongly contrasts with the majority's § 2036 (a)(2) analysis, see n. 3, *supra*.

[10] The majority's argument ignores the fact that within a wide area of discretion Byrum had the "right" to allocate corporate income to purposes other than payment of dividends, and thus the "right" to shut off income to the trust's life tenants.

passed both Houses of Congress in one day—the last day of the session. There was no printed committee report. Substantial references to the bill appear in only two brief sections of the Congressional Record.[11] Under the circumstances I see no warrant for reading the words in a niggardly way.

Moreover, it appears from contemporary evidence that if the use of the word "right" was intended to have any special meaning it was to expand rather than to contract the reach of the restraint effected by the provision in which it appeared. The House Report on

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[11] The intent of Congressmen and the care with which they measured the language which the majority thinks was carefully limited is suggested by the following:

"Mr. HAWLEY. Mr. Speaker, I ask unanimous consent for the present consideration of a joint resolution (H. J. Res. 529) relating to the revenue, reported from the Committee on Ways and Means. [The resolution, § 2036 (a)(1) and (2) substantially as they appear today, was read.]

"The SPEAKER. Is there objection?

"Mr. SCHAFER of Wisconsin. Reserving the right to object, I shall object unless the gentleman explains just what the bill is.

"Mr. HAWLEY. Mr. Speaker and gentlemen, the Supreme Court yesterday handed down a decision to the effect that if a person creates a trust of his property and provides that, during his lifetime, he shall enjoy the benefits of it, and when it is distributed after his death it goes to his heirs—the Supreme Court held that it goes to his heirs free of any estate tax.

. . . . .

"Mr. SCHAFER of Wisconsin. This is a bill to tax the rich man. I shall not object.

"Mr. COLLINS. I would like to have a little more explanation.

"Mr. SABATH. Reserving the right to object, all the resolution purports to do is to place a tax on these trusts that have been in vogue for the last few years for the purpose of evading the inheritance tax on the part of some of these rich estates?

"Mr. HAWLEY. It provides that hereafter no such method shall be used to evade the tax.

"Mr. SABATH. That is good legislation." 74 Cong. Rec. 7198.

the Revenue Act of 1932 notes in relation to amendment of the predecessor of § 2036 (a)(1) that:

> "The insertion of the words 'the right to the income' in place of the words 'the income' is designed to reach a case where decedent had the right to the income, though he did not actually receive it. This is also a clarifying change." H. R. Rep. No. 708, 72d Cong., 1st Sess., 47.

And see S. Rep. No. 665, 72d Cong., 1st Sess., 50, to the same effect.

I repeat the injunction of Mr. Justice Frankfurter, 25 years ago: "This is tax language and should be read in its tax sense." *United States* v. *Ogilvie Hardware Co.*, 330 U. S. 709, 721 (1947) (dissenting opinion).

Lest this by itself not be considered enough to refute the majority's approach, I must add that it is quite repugnant to the words and sense of our opinion in *O'Malley* to read it as though it pivoted on an interpretation of "right" rather than power. The opinion could hardly have been more explicitly concerned with the realities of a settlor's retained power rather than the theoretical legal form of the trust. Thus we said:

> "Here Fabrice [the settlor] was *empowered* . . . . This is a significant *power* . . . of sufficient substance to be deemed the *power* to 'designate' within the meaning of [the predecessor of § 2036 (a) (2)] . . . ." 383 U. S., at 631 (emphasis supplied).

And we said:

> "With the creation of the trusts, he relinquished all of his rights to income except the *power* to distribute that income to the income beneficiaries or to accumulate it and hold it for the remaindermen of the trusts." 383 U. S., at 632 (emphasis supplied).

And we spoke of:

> "This *power* he exercised by accumulating and adding income to principal and this same *power* he held until the moment of his death. . . ." 383 U. S., at 634 (emphasis supplied).

Other passages could be quoted.

IV

Apparently sensing that considerations of logic, policy, and recent case law point to the inclusion of Byrum's trust in his estate, the majority would blunt these considerations by invoking the principle that courts should refrain from decisions detrimental to litigants who have taken a position in legitimate reliance on possibly outdated, but once established, case law. This principle is said to bring great weight to bear in Byrum's favor.

I need not quarrel with the principle. I think, however, that its application in this context is inappropriate.

The majority recites these facts: This Court has never held that retention of power to manage trust assets compels inclusion of a trust in a settlor's estate. In fact, *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339 (1929), specifically held a trust arrangement immune from taxation though the settlor retained power to decide how the trust assets were to be invested. Though *Northern Trust* was decided before the passage of § 2036 (a)(2), it has been followed by "several" more recent lower court decisions. Though most of the lower court decisions provide only the most oblique reference to circumstances like those of this case, a 1962 unappealed Tax Court decision, *Estate of King* v. *Commissioner*, 37 T. C. 973, is squarely in point.

On the basis of these two authorities, a 1929 Supreme Court decision and an unreviewed 1962 Tax Court decision, the majority concludes that there exists a "gener-

ally accepted" rule that Byrum might do what he had done here. It is said that the hypothesized rule "may" have been relied upon by "hundreds" of others; if so, its modification "could" have a serious impact, especially upon settlors who "happen" to have been controlling shareholders in closely held corporations and who "happen" to have transferred shares in those corporations to trusts while forbidding the trustee to sell the shares without approval and while retaining voting rights in those shares. Therefore the rule ought not to be "modified" by this Court.

A

The argument, apparently, is that what "appear[s] to be established" should become established because it has appeared. Judges can and will properly differ on the questions of what deference to accord reliance on a well-established rule, but I doubt that we are precluded from reaching what would otherwise be a right result simply because in the minds of some litigants a contrary rule had heretofore "appear[ed] to be established." If the majority's approach were widely accepted, artful claims of past understanding would consistently suffice to frustrate judicial as well as administrative efforts at present rationalization of the law and every precedent—even at the tax court level—might lay claim to such authority that the Government and the tax bar could afford to leave no case unappealed.

B

Of course, the reliance argument is doubly infirm if the majority's rule cannot be said to have "appear[ed] to be established." Did Byrum have a sound basis for calculating that there was no substantial risk of taxation when he persisted in retaining the powers and privileges described above?

1. Again the majority turns to *Reinecke* v. *Northern Trust Co.*, but it is no more credible to use *Northern Trust* as a foundation for Byrum's § 2036 (a)(2) position than it was to use it as a basis for the Court's § 2036 (a)(1) argument. *Northern Trust* was decided on January 2, 1929, two years and three months before Congress passed the first version of § 2036 (a)(2). Section 402 (c) of the Act of 1921, the provision under which *Northern Trust* was decided, proscribed only transfers in which the settlor attempted to retain "possession or enjoyment" until his death. It is thus not surprising that *Northern Trust* focused on the question of the settlor's "power to recall the property and of control over it *for his own benefit*," 278 U. S., at 347 (emphasis added), and made no mention of possible tax liability because of a retained power to designate which beneficiaries would enjoy the trust income. A holding in this context cannot be precedent of "weight" for a decision as to the efficacy of a trust agreement made—as this trust was—27 years after the predecessor of § 2036 (a)(2) was enacted.

I note also that *Northern Trust* rests on a conceptual framework now rejected in modern law. The case is the elder sibling of *May* v. *Heiner*, 281 U. S. 238, a three-page 1930 decision which quotes *Northern Trust*, at length. *May* in effect held that under § 402 (c) a settlor may be considered to have fully alienated property from himself even if he retains the very substantial string of the right to income from the property so long as he survives. The logic of *May* v. *Heiner* is the logic of *Northern Trust*. As one authority has written:

> "When retention of a life estate was not taxable under the rule of *May* v. *Heiner*, it followed that mere retention of a right to designate the persons to receive the income during the life of the settlor was not taxable . . . ." 1 J. Beveridge, Law of Federal Estate Taxation § 8.06, p. 324 (1956).

That logic no longer survives. When three Supreme Court *per curiams* affirmed *May* on March 2, 1931, and thus indicated that this view would not be confined to its facts, the Treasury Department, on the next morning, wrote Congress imploring it to promptly and finally reject the Court's lenient view of the estate tax system. Congress responded by enacting the predecessor of § 2036 (a)(2) that very day. The President signed the law that evening. Thus the holding of *May* and the underlying approach of *Northern Trust* have no present life. I note further that though Congress has refused to permit pre-1931 trusts to be liable to a rule other than that of *May*, in 1949 this Court itself came to the conclusion that *May* was wrong, and effected "a complete rejection" of its reasoning. *Commissioner* v. *Estate of Church*, 335 U. S. 632,[12] 645.

I seriously doubt that one could have confidently relied on *Reinecke* v. *Northern Trust Co.* when Byrum drafted his trust agreement in 1958. This Court is certainly not bound by its logic, in 1972. I do not mean any disrespect, but as Mr. Justice Cardozo said about another case, *Northern Trust* is a decision "as mouldy as the grave from which counsel . . . brought it forth to face the light of a new age." B. Cardozo, The Growth of the Law, in Selected Writings 244 (M. Hall ed. 1947).

2. The majority argues that there were several lower court cases decided after the enactment of § 2036 (a)(2)

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[12] In considering this and its companion case, *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701 (1949), the Court in effect invited argument on whether *Northern Trust* itself should be overruled. Journal of the Supreme Court, O. T. 1947, pp. 296–297. Though the Court held for the Government without having to reach this issue, I note that in the 23 years since *Church* and *Spiegel* no opinion of this Court has once cited, much less relied upon, *Northern Trust*. Mr. Justice Reed, dissenting in *Church* and concurring in *Spiegel*, announced at the time that he thought these cases overruled *Northern Trust*.

upon which Byrum was entitled to rely, and it is quite true that cases exist holding that a settlor's retention of the power to invest the assets of a trust does not by itself render the trust taxable under § 2036 (a)(2). But the majority's emphasis on these cases as a proper foundation for Byrum's reliance is doubly wrong. First, it could not have evaded Byrum's attention and should not escape the majority that all cited prior cases—save *King* (the tax court case written four years *after* Byrum structured his trust)—involved retention of power to invest by the settlor's appointment of himself as a trustee; that is, they posed instances in which the settlor's retained power was constrained by a fiduciary obligation to treat the life tenant beneficiaries and remainderman beneficiaries exactly as specified in the trust instrument. Thus, the "freedom" to reallocate income between life tenants and remaindermen by, *e. g.*, investing in wasting assets with a high present return and no long-term value, was limited by a judicially enforceable strict standard capable of invocation by the trust beneficiaries by reference to the terms of the trust agreement. See *Jennings* v. *Smith*, 161 F. 2d 74 (CA2 1947), the leading case. Byrum must have realized that the situation he was structuring was quite different. By according himself power of control over the trust income by an indirect means, he kept himself quite free of a fiduciary obligation measured by an ascertainable standard in the trust agreement. Putting aside the question of whether the situation described *should* be distinguished from Byrum's scheme, surely it must be acknowledged that there was an apparent risk that these situations *could* be distinguished by reviewing courts.

Second, the majority's analysis of the case law skips over the uncertainty at the time Byrum was drafting his trust agreement about even the general rule that a settlor could retain control over a trust's investments

if he bound himself as a trustee to an ascertainable method of income distribution. While Byrum and his lawyer were pondering the terms of the trust agreement now in litigation, the Court of Appeals for the First Circuit was reconsidering whether a settlor could retain power over his trust's investments even when he bound himself to a fiduciary's strictest standards of disinterested obligation to his trust's beneficiaries. Early in 1958 the United States District Court for the District of Massachusetts had ruled that a settlor could not maintain powers of management of a trust even as a trustee without assuming estate tax liability. *State Street Trust Co.* v. *United States*, 160 F. Supp. 877. The estate's executor appealed this decision and argued it before the First Circuit panel on October 7, 1958. Byrum's trust agreement was made amidst this litigation, on December 8. On January 23, 1959, the First Circuit affirmed the District Court. 263 F. 2d 635.[13]

The point is not simply that Byrum was on notice that he risked taxability by retaining the powers he retained when he created his trust—though that is true. It is also that within a month of the trust's creation it should have been crystal clear that Byrum ran a substantial risk of taxation by continued retention of control over the trust's stock. Any retained right can be resigned. That Byrum persisted in holding these rights can only be viewed as an indication of the value he placed upon their enjoyment, and of the tax risk he was willing to assume in order to retain control.

The perception that a settlor ran substantial risk of estate tax if he insisted on retaining power over the

[13] The First Circuit again shifted its position on this question in *Old Colony Trust Co.* v. *United States*, 423 F. 2d 601 (1970), but this change is obviously irrelevant to the majority's argument as to the legitimacy of Byrum's reliance from 1958 to 1964.

flow of trust income is hardly some subtle divination of a latter-day observer of the 1958–1959 tax landscape. Contemporary observers saw the same thing. A summary of the field in the 1959 Tax Law Review concluded: "Until the law is made more definite, a grantor who retains any management powers is proceeding at his own risk. . . . [T]here is no certainty. . . ." Gray & Covey, State Street—A Case Study of Sections 2036 (a)(2) and 2038, 15 Tax L. Rev. 75, 102. The relevant subcommittee of the American Bar Association Committee on Estate and Tax Planning hardly thought reliance appropriate. It wrote in 1960 that:

> "The tax-wise draftsman must now undertake to review every living trust in his office intended to be excluded from the settlor's estate in which the settlor acts as a trustee with authority to:
> "1. Exercise broad and virtually unlimited investment powers . . . ." Tax-Wise Drafting of Fiduciary Powers, 4 Tax Counsellor's Quarterly 333, 336.

More could be said, but I think it is clear that the majority should find no solace in its reliance argument.

V

The majority, I repeat, has erred in every substantial respect. It remains only to note that if it is wrong in *any* substantial respect—*i. e.*, either in its § 2036 (a)(1) or (a)(2) arguments—Byrum's trust is by law liable to taxation.

HEALY ET AL. *v.* JAMES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 71–452. Argued March 28, 1972—Decided June 26, 1972

Petitioners, seeking to form a local chapter of Students for a Democratic Society (SDS) at a state-supported college, were denied recognition as a campus organization. Recognition would have entitled petitioners to use campus facilities for meetings and to use of the campus bulletin board and school newspaper. The college president denied recognition because he was not satisfied that petitioners' group was independent of the National SDS, which he concluded has a philosophy of disruption and violence in conflict with the college's declaration of student rights. Petitioners thereupon brought this action for declaratory and injunctive relief. The District Court first ordered a further administrative hearing, after which the president reaffirmed his prior decision. Approving the president's judgment, the District Court held that petitioners had failed to show that they could function free from the National SDS and that the college's refusal to approve the group, which the court found "likely to cause violent acts of disruption," did not violate petitioners' associational rights. The Court of Appeals, purporting not to reach the First Amendment issues, affirmed on the ground that petitioners had failed to avail themselves of the due process accorded to them and to meet their burden of complying with the prevailing standards for recognition. *Held:*

1. The courts erred in (1) discounting the cognizable First Amendment associational interest that petitioners had in furthering their personal beliefs and (2) assuming that the burden was on petitioners to show entitlement to recognition by the college rather than on the college to justify its nonrecognition of the group, once petitioners had made application conformably to college requirements. Pp. 180–185.

2. Insofar as the denial of recognition to petitioners' group was based on an assumed relationship with the National SDS, or was a result of disagreement with the group's philosophy, or was a consequence of a fear of disruption, for which there was no support in the record, the college's decision violated the petitioners' First Amendment rights. A proper basis for nonrecognition might have

been afforded, however, by a showing that the group refused to comply with a rule requiring them to abide by reasonable campus regulations. Since the record is not clear whether the college has such a rule and, if so, whether petitioners intend to observe it, these issues remain to be resolved. Pp. 185–194.

445 F. 2d 1122, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 195. DOUGLAS, J., filed a separate opinion, *post*, p. 196. REHNQUIST, J., filed a statement concurring in the result, *post*, p. 201.

Melvin L. Wulf argued the cause for petitioners. With him on the brief were *Eugene Z. DuBose, Jr.*, *Alvin Pudlin*, and *Sanford Jay Rosen*.

F. Michael Ahern, Assistant Attorney General of Connecticut, argued the cause for respondents. With him on the brief was *Robert K. Killian*, Attorney General.

Briefs of *amici curiae* urging affirmance were filed by *Evelle J. Younger*, Attorney General of California, and *Donald B. Day*, Deputy Attorney General, for the Board of Trustees of California State Colleges; by *Frank G. Carrington, Jr.*, and *Alan S. Ganz* for Americans for Effective Law Enforcement, Inc.; and by *Morris I. Leibman* and *Philip B. Kurland* for the American Association of Presidents of Independent Colleges and Universities.

MR. JUSTICE POWELL delivered the opinion of the Court.

This case, arising out of a denial by a state college of official recognition to a group of students who desired to form a local chapter of Students for a Democratic Society (SDS), presents this Court with questions requiring the application of well-established First Amendment principles. While the factual background of this

particular case raises these constitutional issues in a manner not heretofore passed on by the Court, and only infrequently presented to lower federal courts, our decision today is governed by existing precedent.

As the case involves delicate issues concerning the academic community, we approach our task with special caution, recognizing the mutual interest of students, faculty members, and administrators in an environment free from disruptive interference with the educational process. We also are mindful of the equally significant interest in the widest latitude for free expression and debate consonant with the maintenance of order. Where these interests appear to compete the First Amendment, made binding on the States by the Fourteenth Amendment, strikes the required balance.

I

We mention briefly at the outset the setting in 1969–1970. A climate of unrest prevailed on many college campuses in this country. There had been widespread civil disobedience on some campuses, accompanied by the seizure of buildings, vandalism, and arson. Some colleges had been shut down altogether, while at others files were looted and manuscripts destroyed. SDS chapters on some of those campuses had been a catalytic force during this period.[1] Although the causes of campus disruption were many and complex, one of the prime consequences of such activities was the denial of the lawful exercise of First Amendment rights to the majority of students by the few. Indeed, many of the most cherished characteristics long associated with institutions of higher learning appeared to be endangered. For-

[1] See Report of the President's Commission on Campus Unrest (1970); Report of the American Bar Association Commission on Campus Government and Student Dissent (1970).

tunately, with the passage of time, a calmer atmosphere and greater maturity now pervade our campuses. Yet, it was in this climate of earlier unrest that this case arose.

Petitioners are students attending Central Connecticut State College (CCSC), a state-supported institution of higher learning. In September 1969 they undertook to organize what they then referred to as a "local chapter" of SDS. Pursuant to procedures established by the College, petitioners filed a request for official recognition as a campus organization with the Student Affairs Committee, a committee composed of four students, three faculty members, and the Dean of Student Affairs. The request specified three purposes for the proposed organization's existence. It would provide "a forum of discussion and self-education for students developing an analysis of American society"; it would serve as "an agency for integrating thought with action so as to bring about constructive changes"; and it would endeavor to provide "a coordinating body for relating the problems of leftist students" with other interested groups on campus and in the community.[2] The Committee, while satisfied that the statement of purposes was clear and unobjectionable on its face, exhibited concern over the relationship between the proposed local group and the National SDS organization. In response to inquiries, representatives of the proposed organization stated that they would not affiliate with any national organization and that their group would remain "completely independent."

In response to other questions asked by Committee members concerning SDS' reputation for campus disruption, the applicants made the following statements,

[2] The statement of purposes is set out as an Appendix to the Second Circuit's opinion and appears following the dissent thereto. 445 F. 2d 1122, 1135–1139 (1971).

which proved significant during the later stages of these proceedings:

"Q. How would you respond to issues of violence as other S. D. S. chapters have?

"A. Our action would have to be dependent upon each issue.

"Q. Would you use any means possible?

"A. No I can't say that; would not know until we know what the issues are.

. . . . .

"Q. Could you envision the S. D. S. interrupting a class?

"A. Impossible for me to say."

With this information before it, the Committee requested an additional filing by the applicants, including a formal statement regarding affiliations. The amended application filed in response stated flatly that "CCSC Students for a Democratic Society are not under the dictates of any National organization." [3] At a second hearing before the Student Affairs Committee, the question of relationship with the National organization was raised again. One of the organizers explained that the National SDS was divided into several "factional groups," that the national-local relationship was a loose one, and that the local organization accepted only "certain ideas" but not all of the National organization's aims and philosophies.

By a vote of six to two the Committee ultimately approved the application and recommended to the Pres-

[3] 445 F. 2d, at 1133. During the Committee's consideration of petitioners' application, one of the group's representatives was asked why, if it indeed desired to remain independent, it chose to use a nationally known name. The witness' response was that "the name brings to mind the type of organization we wish to bring across, that is, a left-wing organization which will allow students interested in such to express themselves."

ident of the College, Dr. James, that the organization be accorded official recognition. In approving the application, the majority indicated that its decision was premised on the belief that varying viewpoints should be represented on campus and that since the Young Americans for Freedom, the Young Democrats, the Young Republicans, and the Liberal Party all enjoyed recognized status, a group should be available with which "left wing" students might identify. The majority also noted and relied on the organization's claim of independence. Finally, it admonished the organization that immediate suspension would be considered if the group's activities proved incompatible with the school's policies against interference with the privacy of other students or destruction of property. The two dissenting members based their reservation primarily on the lack of clarity regarding the organization's independence.

Several days later, the President rejected the Committee's recommendation, and issued a statement indicating that petitioners' organization was not to be accorded the benefits of official campus recognition. His accompanying remarks, which are set out in full in the margin,[4] indicate several reasons for his action. He

[4] The President stated:

"Though I have full appreciation for the action of the Student Affairs Committee and the reasons stated in their minutes for the majority vote recommending approval of a local chapter of Students for a Democratic Society, it is my judgment that the statement of purpose to form a local chapter of Students for a Democratic Society carries full and unmistakable adherence to at least some of the major tenets of the national organization, loose and divided though that organization may be. The published aims and philosophy of the Students for a Democratic Society, which include disruption and violence, are contrary to the approved policy (by faculty, students, and administration) of Central Connecticut State College which states:

" 'Students do not have the right to invade the privacy of others, to damage the property of others, to disrupt the regular and es-

found that the organization's philosophy was antithetical to the school's policies,[5] and that the group's independence was doubtful. He concluded that approval should

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sential operation of the college, or to interfere with the rights of others.'

"The further statement on the request for recognition that 'CCSC Students for a Democratic Society are not under the dictates of any National organization' in no way clarifies why if a group intends to follow the established policy of the college, they wish to become a local chapter of an organization which openly repudiates such a policy.

"Freedom of speech, academic freedom on the campus, the freedom of establishing an open forum for the exchange of ideas, the freedoms outlined in the Statement on Rights, Freedoms, and Responsibilities of Students that 'college students and student organizations shall have the right to examine and discuss all questions of interest to them, to express opinion publicly and privately, and to support causes by orderly means. They may organize public demonstrations and protest gatherings and utilize the right of petition'—these are all precious freedoms that we cherish and are freedoms on which we stand. To approve any organization or individual who joins with an organization which openly repudiates those principles is contrary to those freedoms and to the approved 'Statement on the Rights, Freedoms, and Responsibilities of Students' at Central." App. 15–16.

[5] In 1969, CCSC adopted, as have many other colleges and universities, a Statement on Rights, Freedoms and Responsibilities of Students. This statement, commonly referred to as the "Student Bill of Rights," is printed as an Appendix to the Second Circuit's majority opinion in this case, 445 F. 2d, at 1135–1139, see n. 2, *supra*. Part V of that statement establishes the standards for approval of campus organizations and imposes several basic limitations on their campus activities:

"A. Care shall be taken in the establishment and organization of campus groups so that the basic rights, freedoms and responsibilities of students will be preserved.

"B. Student organizations shall submit a clear statement of purpose, criteria for membership, rules of procedures and a list of officers as a condition of institutional recognition. They shall not be required to submit a membership list as a condition of institutional recognition.

"C. Membership in campus organizations shall be limited to

not be granted to any group that "openly repudiates" the College's dedication to academic freedom.

Denial of official recognition posed serious problems for the organization's existence and growth. Its members were deprived of the opportunity to place announcements regarding meetings, rallies, or other activities in the student newspaper; they were precluded from using various campus bulletin boards; and—most importantly—nonrecognition barred them from using campus facilities for holding meetings. This latter disability was brought home to petitioners shortly after the President's announcement. Petitioners circulated a notice calling a meeting to discuss what further action should be taken in light of the group's official rejection. The members met at the coffee shop in the Student Center ("Devils' Den") but were disbanded on the President's order since nonrecognized groups were not entitled to use such facilities.[6]

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matriculated students (day or evening) at the college. Membership shall not be restricted by race, religion or nationality. The members shall have sole power to determine organization policy consistent with the regulations of the college.

"D. Each organization is free to choose its own adviser. Advisers to organizations shall advise but not control the organizations and their policies.

"E. College students and student organizations shall have the right to examine and discuss all questions of interest to them, to express opinion publicly and privately, and to support causes by orderly means. They may organize public demonstrations and protest gatherings and utilize the right of petition. Students do not have the right to deprive others of the opportunity to speak or be heard, to invade the privacy of others, to damage the property of others, to disrupt the regular and essential operation of the college, or to interfere with the rights of others."

[6] During the meeting petitioners were approached by two of the College's deans, who served petitioners with a memorandum from the President stating:

"Notice has been received by this office of a meeting of the

Their efforts to gain recognition having proved ultimately unsuccessful, and having been made to feel the burden of nonrecognition, petitioners resorted to the courts. They filed a suit in the United States District Court for the District of Connecticut, seeking declaratory and injunctive relief against the President of the College, other administrators, and the State Board of Trustees. Petitioners' primary complaint centered on the denial of First Amendment rights of expression and association arising from denial of campus recognition. The cause was submitted initially on stipulated facts, and, after a short hearing, the judge ruled that petitioners had been denied procedural due process because the President had based his decision on conclusions regarding the applicant's affiliation which were outside the record before him. The court concluded that if the President wished to act on the basis of material outside the application he must at least provide petitioners a hearing and opportunity to introduce evidence as to their affiliations. 311 F. Supp. 1275, 1279, 1281. While retaining jurisdiction over the case, the District Court ordered respondents to hold a hearing in order to clarify the several ambiguities surrounding the President's decision. One of the matters to be explored was whether the local organization, true to its repeated affirmations, was in fact independent of the National SDS. *Id.*, at 1282. And if the hearing demonstrated that the two were not separable, the respondents were instructed that they might then review the "aims and philosophy" of the National organization. *Ibid.*

'C. C. S. C.-S. D. S. on Thursday—November 6 at 7:00 p. m. at the Devils' Den.'

"Such meeting may not take place in the Devils' Den of the Student Center nor in or on any other property of the college since the C. C. S. C.-S. D. S. is not a duly recognized college organization.

"You are hereby notified by this action to cease and desist from meeting on college property."

Pursuant to the court's order, the President designated Dean Judd, the Dean of Student Affairs, to serve as hearing officer and a hearing was scheduled. The hearing, which spanned two dates and lasted approximately two hours, added little in terms of objective substantive evidence to the record in this case. Petitioners introduced a statement offering to change the organization's name from "CCSC local chapter of SDS" to "Students for a Democratic Society of Central Connecticut State College." They further reaffirmed that they would "have no connection whatsoever to the structure of an existing national organization." [7] Petitioners also introduced the testimony of their faculty adviser to the effect that some local SDS organizations elsewhere were unaffiliated with any national organization. The hearing officer, in addition to introducing the minutes from the two pertinent Student Affairs Committee meetings, also introduced, *sua sponte*, portions of a transcript of hearings before the United States House of Representatives Internal Security Committee investigating the activities of SDS. Excerpts were offered both to prove that violent and disruptive activities had been attributed to SDS elsewhere and to demonstrate that there existed a national organization that recognized and cooperated with regional and local college campus affiliates. Petitioners did not challenge the asserted existence of a National SDS, nor did they question that it did have a system of affiliations of some

[7] 319 F. Supp. 113, 114 (1970). The hearing officer, over petitioners' objection, ruled that the statement was inadmissible, apparently on the ground that it would constitute an amendment to the original application and would be beyond the permissible scope of the hearing. Whatever the merits of this ruling, the statement was in the record reviewed by the President and was relied on in the subsequent District Court opinion without reference to its prior exclusion. *Ibid.*

sort. Their contention was simply that their organization would not associate with that network. Throughout the hearing the parties were acting at cross purposes. What seemed relevant to one appeared completely immaterial to the other. This failure of the hearing to advance the litigation was, at bottom, the consequence of a more basic failure to join issue on the considerations that should control the President's ultimate decision, a problem to which we will return in the ensuing section.

Upon reviewing the hearing transcript and exhibits, the President reaffirmed his prior decision to deny petitioners recognition as a campus organization. The reasons stated, closely paralleling his initial reasons, were that the group would be a "disruptive influence" at CCSC and that recognition would be "contrary to the orderly process of change" on the campus.

After the President's second statement issued, the case then returned to the District Court, where it was ordered dismissed. The court concluded, first, that the formal requisites of procedural due process had been complied with, second, that petitioners had failed to meet their burden of showing that they could function free from the National organization, and, third, that the College's refusal to place its stamp of approval on an organization whose conduct it found "likely to cause violent acts of disruption" did not violate petitioners' associational rights. 319 F. Supp. 113, 116.

Petitioners appealed to the Court of Appeals for the Second Circuit where, by a two-to-one vote, the District Court's judgment was affirmed. The majority purported not to reach the substantive First Amendment issues on the theory that petitioners had failed to avail themselves of the due process accorded them and had failed to meet their burden of complying with the prevailing standards for recognition. 445 F. 2d 1122, 1131–1132. Judge

Smith dissented, disagreeing with the majority's refusal to address the merits and finding that petitioners had been deprived of basic First Amendment rights. *Id.*, at 1136. This Court granted certiorari and, for the reasons that follow, we conclude that the judgments of the courts below must be reversed and the case remanded for reconsideration.

II

At the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker* v. *Des Moines Independent School District*, 393 U. S. 503, 506 (1969). Of course, as Mr. Justice Fortas made clear in *Tinker*, First Amendment rights must always be applied "in light of the special characteristics of the . . . environment" in the particular case. *Ibid.* And, where state-operated educational institutions are involved, this Court has long recognized "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id.*, at 507. Yet, the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton* v. *Tucker*, 364 U. S. 479, 487 (1960). The college classroom with its surrounding environs is peculiarly the " 'marketplace of ideas,' " and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding aca-

demic freedom. *Keyishian* v. *Board of Regents,* 385 U. S. 589, 603 (1967); *Sweezy* v. *New Hampshire,* 354 U. S. 234, 249–250 (1957) (plurality opinion of Mr. Chief Justice Warren), 262 (Frankfurter, J., concurring in result).

Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition. See, *e. g., Baird* v. *State Bar of Arizona,* 401 U. S. 1, 6 (1971); *NAACP* v. *Button,* 371 U. S. 415, 430 (1963); *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U. S. 293, 296 (1961); *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449 (1958) (Harlan, J., for a unanimous Court). There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right. The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes. The practical effect of nonrecognition was demonstrated in this case when, several days after the President's decision was announced, petitioners were not allowed to hold a meeting in the campus coffee shop because they were not an approved group.

Petitioners' associational interests also were circumscribed by the denial of the use of campus bulletin boards and the school newspaper. If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students. Moreover, the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the admin-

istration, faculty members, and other students.[8] Such impediments cannot be viewed as insubstantial.

Respondents and the courts below appear to have taken the view that denial of official recognition in this case abridged no constitutional rights. The District Court concluded that

> "President James' discretionary action in denying this application cannot be legitimately magnified and distorted into a constitutionally cognizable interference with the personal ideas or beliefs of any segment of the college students; neither does his action deter in any material way the individual advocacy of their personal beliefs; nor can his action be reasonably construed to be an invasion of, or having a chilling effect on academic freedom." 319 F. Supp., at 116.

In that court's view all that was denied petitioners was the "administrative seal of official college respectability."[9] *Ibid.* A majority of the Court of Appeals agreed that petitioners had been denied only the "college's stamp of approval." 445 F. 2d, at 1131. Respondents take that same position here, arguing that petitioners still may meet as a group off campus, that

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[8] It is unclear on this record whether recognition also carries with it a right to seek funds from the school budget. Petitioners' counsel at oral argument indicated that official recognition entitled the group to "make application for use of student funds." Tr. of Oral Arg. 4. The first District Court opinion, however, states flatly that "[r]ecognition does not thereby entitle an organization to college financial support." 311 F. Supp. 1275, 1277. Since it appears that, at the least, recognition only entitles a group to *apply* for funds, and since the record is silent as to the criteria used in allocating such funds, we do not consider possible funding as an associational aspect of nonrecognition in this case.

[9] These statements are in contrast to the first opinion by the District Court, which reflected a full appreciation of the constitutional significance of petitioners' claim. 311 F. Supp., at 1280–1282.

they still may distribute written material off campus, and that they still may meet together informally on campus—as individuals, but not as CCSC-SDS.

We do not agree with the characterization by the courts below of the consequences of nonrecognition. We may concede, as did Mr. Justice Harlan in his opinion for a unanimous Court in *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S., at 461, that the administration "has taken no direct action . . . to restrict the rights of [petitioners] to associate freely . . . ." But the Constitution's protection is not limited to direct interference with fundamental rights. The requirement in *Patterson* that the NAACP disclose its membership lists was found to be an impermissible, though indirect, infringement of the members' associational rights. Likewise, in this case, the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's action. We are not free to disregard the practical realities. MR. JUSTICE STEWART has made the salient point: "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates* v. *City of Little Rock,* 361 U. S. 516, 523 (1960). See also *Sweezy* v. *New Hampshire,* 354 U. S., at 263 (Frankfurter, J., concurring in result); *Watkins* v. *United States,* 354 U. S. 178, 197 (1957).

The opinions below also assumed that petitioners had the burden of showing entitlement to recognition by the College.[10] While petitioners have not challenged the procedural requirement that they file an application in conformity with the rules of the College,[11] they do

[10] 445 F. 2d, at 1131; 319 F. Supp., at 116.

[11] The standards for official recognition require applicants to provide a clear statement of purposes, criteria for membership, rules of procedure, and a list of officers. Applicants must limit member-

question the view of the courts below that final rejection could rest on their failure to convince the administration that their organization was unaffiliated with the National SDS. For reasons to be stated later in this opinion, we do not consider the issue of affiliation to be a controlling one. But, apart from any particular issue, once petitioners had filed an application in conformity with the requirements, the burden was upon the College administration to justify its decision of rejection. See, *e. g.*, *Law Students Civil Rights Research Council* v. *Wadmond*, 401 U. S. 154, 162–163 (1971); *United States* v. *O'Brien*, 391 U. S. 367, 376–377 (1968); *Speiser* v. *Randall*, 357 U. S. 513 (1958). It is to be remembered that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners' organization the range of associational activities described above. While a college has a legitimate interest in preventing disruption on the campus, which under circumstances requiring the safeguarding of that interest may justify such restraint, a "heavy burden" rests on the college to demonstrate the appropriateness of that action. See *Near* v. *Minnesota*, 283 U. S. 697, 713–716 (1931); *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 418 (1971); *Freedman* v. *Maryland*, 380 U. S. 51, 57 (1965).

III

These fundamental errors—discounting the existence of a cognizable First Amendment interest and misplac-

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ship to "matriculated students" and may not discriminate on the basis of race, religion or nationality. The standards further state that groups may "examine and discuss all questions of interest," and they may conduct demonstrations and utilize their right of petition, but they are prohibited from interfering with the rights of other students. See n. 5, *supra*. Petitioners have not challenged these standards and their validity is not here in question.

ing the burden of proof—require that the judgments below be reversed. But we are unable to conclude that no basis exists upon which nonrecognition might be appropriate. Indeed, based on a reasonable reading of the ambiguous facts of this case, there appears to be at least one potentially acceptable ground for a denial of recognition. Because of this ambiguous state of the record we conclude that the case should be remanded, and, in an effort to provide guidance to the lower courts upon reconsideration, it is appropriate to discuss the several bases of President James' decision. Four possible justifications for nonrecognition, all closely related, might be derived from the record and his statements. Three of those grounds are inadequate to substantiate his decision: a fourth, however, has merit.

A

From the outset the controversy in this case has centered in large measure around the relationship, if any, between petitioners' group and the National SDS. The Student Affairs Committee meetings, as reflected in its minutes, focused considerable attention on this issue; the court-ordered hearing also was directed primarily to this question. Despite assurances from petitioners and their counsel that the local group was in fact independent of the National organization, it is evident that President James was significantly influenced by his apprehension that there was a connection. Aware of the fact that some SDS chapters had been associated with disruptive and violent campus activity, he apparently considered that affiliation itself was sufficient justification for denying recognition.[12]

Although this precise issue has not come before the Court heretofore, the Court has consistently disapproved

[12] See n. 4, *supra*, for the complete text of the President's statement.

governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization. See, *e. g.*, *United States* v. *Robel*, 389 U. S. 258 (1967); *Keyishian* v. *Board of Regents*, 385 U. S., at 605–610; *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Scales* v. *United States*, 367 U. S. 203 (1961). In these cases it has been established that "guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government," is an impermissible basis upon which to deny First Amendment rights. *United States* v. *Robel*, *supra*, at 265. The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims.[13]

Students for a Democratic Society, as conceded by the College and the lower courts, is loosely organized, having various factions and promoting a number of diverse social and political views, only some of which call for unlawful action.[14] Not only did petitioners proclaim their complete independence from this organization,[15] but they also

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[13] In addition to the cases cited in the text above, see also *Law Students Civil Rights Research Council* v. *Wadmond*, 401 U. S. 154, 164–166 (1971); *In re Stolar*, 401 U. S. 23, 28 (1971); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964); *Noto* v. *United States*, 367 U. S. 290, 299–300 (1961).

[14] See Hearings before a Subcommittee of the House Committee on Appropriations, 92d Cong., 2d Sess., pt. 1, p. 916 (1972), in which the former Director of the Federal Bureau of Investigation, J. Edgar Hoover, stated that while violent factions have spun off from SDS, its present leadership is "critical of bombing and violence."

[15] Petitioners asserted their independence both orally and in a written submission before the Student Affairs Committee. They restated their nonaffiliation in a formal statement filed prior to the court-ordered hearing. The only indication to the contrary is their unwillingness to eschew use of the SDS name altogether. But see n. 3, *supra*.

indicated that they shared only some of the beliefs its leaders have expressed.[16] On this record it is clear that the relationship was not an adequate ground for the denial of recognition.

B

Having concluded that petitioners were affiliated with, or at least retained an affinity for, National SDS, President James attributed what he believed to be the philosophy of that organization to the local group. He characterized the petitioning group as adhering to "some of the major tenets of the national organization," including a philosophy of violence and disruption.[17] Understandably, he found that philosophy abhorrent. In an article signed by President James in an alumni periodical, and made a part of the record below, he announced his unwillingness to "sanction an organization that openly advocates the destruction of the very ideals and freedoms upon which the academic life is founded." He further emphasized that the petitioners' "philosophies" were "counter to the official policy of the college."

The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. As repugnant as these views may have been, especially to one with President James' responsibility, the mere expression of them would not justify the denial of First Amendment rights. Whether petitioners did in fact advocate a philosophy of "destruction" thus becomes immaterial. The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed

[16] Representatives of the group stated during the Student Affairs Committee meetings that they did not identify with all of the National's statements, but wished simply to "pick . . . certain ideas" from that organization.

[17] See n. 4, *supra*.

by any group to be abhorrent. As Mr. Justice Black put it most simply and clearly:

> "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Communist Party* v. *SACB*, 367 U. S. 1, 137 (dissenting opinion) (1961).

C

As the litigation progressed in the District Court, a third rationale for President James' decision—beyond the questions of affiliation and philosophy—began to emerge. His second statement, issued after the court-ordered hearing, indicates that he based rejection on a conclusion that this particular group would be a "disruptive influence at CCSC." This language was underscored in the second District Court opinion. In fact, the court concluded that the President had determined that CCSC-SDS' "prospective campus activities were likely to cause a disruptive influence at CCSC." 319 F. Supp., at 116.

If this reason, directed at the organization's activities rather than its philosophy, were factually supported by the record, this Court's prior decisions would provide a basis for considering the propriety of nonrecognition. The critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969) (unanimous *per curiam* opinion). See also *Scales* v. *United States*, 367 U. S., at 230–232; *Noto* v. *United States*, 367 U. S. 290, 298 (1961);

Yates v. *United States*, 354 U. S. 298 (1957). In the context of the "special characteristics of the school environment," [18] the power of the government to prohibit "lawless action" is not limited to acts of a criminal nature. Also prohibitable are actions which "materially and substantially disrupt the work and discipline of the school." *Tinker* v. *Des Moines Independent School District*, 393 U. S., at 513. Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.

The "Student Bill of Rights" at CCSC, upon which great emphasis was placed by the President, draws precisely this distinction between advocacy and action. It purports to impose no limitations on the right of college student organizations "to examine and discuss *all* questions of interest to them." (Emphasis supplied.) But it also states that students have no right (1) "to deprive others of the opportunity to speak or be heard," (2) "to invade the privacy of others," (3) "to damage the property of others," (4) "to disrupt the regular and essential operation of the college," or (5) "to interfere with the rights of others." [19] The line between permissible speech and impermissible conduct tracks the constitutional requirement, and if there were an evidential basis to support the conclusion that CCSC-SDS posed a substantial threat of material disruption in violation of that command the President's decision should be affirmed.[20]

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[18] *Tinker* v. *Des Moines Independent School District*, 393 U. S. 503, 506 (1969).

[19] See n. 5, *supra*.

[20] It may not be sufficient merely to show the existence of a legitimate and substantial state interest. Where state action designed to regulate prohibitable action also restricts associational rights—as nonrecognition does—the State must demonstrate that the action

The record, however, offers no substantial basis for that conclusion. The only support for the view expressed by the President, other than the reputed affiliation with National SDS, is to be found in the ambivalent responses offered by the group's representatives at the Student Affairs Committee hearing, during which they stated that they did not know whether they might respond to "issues of violence" in the same manner that other SDS chapters had on other campuses. Nor would they state unequivocally that they could never "envision . . . interrupting a class." Whatever force these statements might be thought to have is largely dissipated by the following exchange between petitioners' counsel and the Dean of Student Affairs during the court-ordered hearing:

> Counsel: ". . . I just read the document that you're offering [minutes from Student Affairs Committee meeting] and I can't see that there's anything in it that intimates that these students contemplate any illegal or disruptive practice."
>
> Dean: "No. There's no question raised to that, counselor . . . ." App. 73–74.

Dean Judd's remark reaffirms, in accord with the full record, that there was no substantial evidence that these particular individuals acting together would con-

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taken is reasonably related to protection of the State's interest and that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968). See also *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288 (1964); *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539, 546 (1963); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958). On this record, absent a showing of any likelihood of disruption or unwillingness to recognize reasonable rules governing campus conduct, it is not necessary for us to decide whether denial of recognition is an appropriately related and narrow response.

stitute a disruptive force on campus. Therefore, insofar as nonrecognition flowed from such fears, it constituted little more than the sort of "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression." *Tinker* v. *Des Moines Independent School District,* 393 U. S., at 508.

D

These same references in the record to the group's equivocation regarding how it might respond to "issues of violence" and whether it could ever "envision . . . interrupting a class," suggest a fourth possible reason why recognition might have been denied to these petitioners. These remarks might well have been read as announcing petitioners' unwillingness to be bound by reasonable school rules governing conduct. The College's Statement of Rights, Freedoms, and Responsibilities of Students contains, as we have seen, an explicit statement with respect to campus disruption. The regulation, carefully differentiating between advocacy and action, is a reasonable one, and petitioners have not questioned it directly.[21] Yet their statements raise considerable question whether they intend to abide by the prohibitions contained therein.[22]

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[21] See n. 5, *supra.*

[22] The Court of Appeals found that petitioners "failed candidly to respond to inquiries whether they would resort to violence and disruption on the CCSC campus, including interruption of classes." 445 F. 2d, at 1131. While petitioners' statements may be read as intimating a rejection of reasonable regulations in advance, there is in fact substantial ambiguity on this point. The questions asked by members of the Student Affairs Committee do not appear to have been propounded with any clear distinction in mind between that which the petitioners might advocate and the conduct in which they might engage. Nor did the Student Affairs Committee attempt to obtain a clarification of the petitioners' ambiguous answers by

As we have already stated in Parts B and C, the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not. Petitioners may, if they so choose, preach the propriety of amending or even doing away with any or all campus regulations. They may not, however, undertake to flout these rules. MR. JUSTICE BLACKMUN, at the time he was a circuit judge on the Eighth Circuit, stated:

> "We . . . hold that a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct." *Esteban* v. *Central Missouri State College*, 415 F. 2d 1077, 1089 (CA8 1969), cert. denied, 398 U. S. 965 (1970).

Just as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related

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asking specifically whether the group was willing to abide by the Student Bill of Rights governing all campus organizations.

Moreover, this question was not among those referred by the District Court to the administrative hearing, and it was there addressed only tangentially. The group members who had made statements before the Student Affairs Committee did not testify, and their position was not clarified. Their counsel, whose tactics were characterized as "disruptive" by the Court of Appeals, elected to make argumentative statements rather than elicit relevant testimony. *Id.*, at 1126. Indeed, the District Court's failure to identify the question of willingness to abide by the College's rules and regulations as a significant subject of inquiry, coupled with the equivocation on the part of the group's representatives, lends support to our view that a remand is necessary.

activities must be respected.[23] A college administration may impose a requirement, such as may have been imposed in this case, that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law. Such a requirement does not impose an impermissible condition on the students' associational rights. Their freedom to speak out, to assemble, or to petition for changes in school rules is in no sense infringed. It merely constitutes an agreement to conform with reasonable standards respecting conduct. This is a minimal requirement, in the interest of the entire academic community, of any group seeking the privilege of official recognition.

Petitioners have not challenged in this litigation the procedural or substantive aspects of the College's requirements governing applications for official recognition. Although the record is unclear on this point, CCSC may have, among its requirements for recognition, a rule that prospective groups affirm that they intend to comply with reasonable campus regulations. Upon remand it should first be determined whether the College recognition procedures contemplate any such requirement. If so, it should then be ascertained whether petitioners intend to comply. Since we do not have the terms of a specific prior affirmation rule before us, we are not called on to decide whether any particular formulation would or would not prove constitutionally acceptable. Assuming the existence of a valid rule, however, we do conclude that the benefits of participation in the internal life of the college community may be denied to any

[23] See, *e. g.*, *Adderley* v. *Florida*, 385 U. S. 39, 47–48 (1966); *Cox* v. *Louisiana*, 379 U. S. 536, 558 (1965); *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U. S. 293, 297 (1961).

group that reserves the right to violate any valid campus rules with which it disagrees.[24]

IV

We think the above discussion establishes the appropriate framework for consideration of petitioners' request for campus recognition. Because respondents failed to accord due recognition to First Amendment principles, the judgments below approving respondents' denial of recognition must be reversed. Since we cannot conclude from this record that petitioners were willing to abide by reasonable campus rules and regulations, we order the case remanded for reconsideration. We note, in so holding, that the wide latitude accorded by the Constitution to the freedoms of expression and association is not without its costs in terms of the risk to the maintenance of civility and an ordered society. Indeed, this latitude often has resulted, on the campus and elsewhere, in the infringement of the rights of others. Though we deplore the tendency of some to abuse the very constitutional privileges they invoke, and although the infringement of rights of others certainly should not be tolerated, we reaffirm this Court's dedication to the principles of the Bill of Rights upon which our vigorous and free society is founded.

Reversed and remanded.

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[24] In addition to the College administration's broad rulemaking power to assure that the traditional academic atmosphere is safeguarded, it may also impose sanctions on those who violate the rules. We find, for instance, that the Student Affairs Committee's admonition to petitioners in this case suggests one permissible practice—recognition, once accorded, may be withdrawn or suspended if petitioners fail to respect campus law. See, *e. g.*, *University of Southern Mississippi Chapter of Mississippi Civil Liberties Union* v. *University of Southern Mississippi*, 452 F. 2d 564 (CA5 1971); *American Civil Liberties Union* v. *Radford College*, 315 F. Supp. 893 (WD Va. 1970).

MR. CHIEF JUSTICE BURGER, concurring.

I am in agreement with what is said in the Court's opinion and I join in it. I do so because I read the basis of the remand as recognizing that student organizations seeking the privilege of official campus recognition must be willing to abide by valid rules of the institution applicable to all such organizations. This is a reasonable condition insofar as it calls for the disavowal of resort to force, disruption, and interference with the rights of others.

The District Judge was troubled by the lack of a comprehensive procedural scheme that would inform students of the steps to be taken to secure recognized standing, and by the lack of articulated criteria to be used in evaluating eligibility for recognition. It was for this reason, as I read the record, that he remanded the matter to the college for a factual inquiry and for a more orderly processing in a *de novo* hearing within the college administrative structure. It is within that structure and within the academic community that problems such as these should be resolved. The courts, state or federal, should be a last resort. Part of the educational experience of every college student should be an experience in responsible self-government and this must be a joint enterprise of students and faculty. It should not be imposed unilaterally from above, nor can the terms of the relationship be dictated by students. Here, in spite of the wisdom of the District Court in sending the case back to the college, the issue identified by the Court's opinion today was not adequately addressed in the hearing.

The relatively placid life of the college campus of the past has not prepared either administrators or students for their respective responsibilities in maintaining an atmosphere in which divergent views can be asserted

vigorously, but civilly, to the end that those who seek to be heard accord the same right to all others. The "Statement on Rights, Freedoms and Responsibilities of Students," sometimes called the "Student Bill of Rights," in effect on this campus, and not questioned by petitioners, reflected a rational adjustment of the competing interests. But it is impossible to know from the record in this case whether the student group was willing to acknowledge an obligation to abide by that "Bill of Rights."

Against this background, the action of the Court in remanding on this issue is appropriate.

MR. JUSTICE DOUGLAS.

While I join the opinion of the Court, I add a few words.

As Dr. Birenbaum* says, the status quo of the college or university is the governing body (trustees or overseers), administrative officers, who include caretakers, and the police, and the faculty. Those groups have well-defined or vaguely inferred values to perpetuate. The customary technique has been to conceive of the minds of students as receptacles for the information which the faculty have garnered over the years. Education is commonly thought of as the process of filling the receptacles with what the faculty in its wisdom deems fit and proper.

Many, inside and out of faculty circles, realize that one of the main problems of faculty members is their own re-education or re-orientation. Some have narrow specialties that are hardly relevant to modern times. History has passed others by, leaving them interesting relics of a bygone day. More often than not they represent those who withered under the pressures of McCarthyism or other forces of conformity and represent

*See the Appendix to this opinion.

but a timid replica of those who once brought distinction to the ideal of academic freedom.

The confrontation between them and the oncoming students has often been upsetting. The problem is not one of choosing sides. Students—who, by reason of the Twenty-sixth Amendment, become eligible to vote when 18 years of age—are adults who are members of the college or university community. Their interests and concerns are often quite different from those of the faculty. They often have values, views, and ideologies that are at war with the ones which the college has traditionally espoused or indoctrinated. When they ask for change, they, the students, speak in the tradition of Jefferson and Madison and the First Amendment.

The First Amendment does not authorize violence. But it does authorize advocacy, group activities, and espousal of change.

The present case is minuscule in the events of the 60's and 70's. But the fact that it has to come here for ultimate resolution indicates the sickness of our academic world, measured by First Amendment standards. Students as well as faculty are entitled to credentials in their search for truth. If we are to become an integrated, adult society, rather than a stubborn status quo opposed to change, students and faculties should have communal interests in which each age learns from the other. Without ferment of one kind or another, a college or university (like a federal agency or other human institution) becomes a useless appendage to a society which traditionally has reflected the spirit of rebellion.

APPENDIX TO OPINION OF DOUGLAS, J.

"A compulsory ghetto fails as a community because its inhabitants lack the power to develop common goals and to pursue them effectively together. It fails too

because of a fatal disconnection between the possession and use of power and the cognition that knowledge, as a form of power, carries with it political responsibility. In these respects the campus is now like the compulsory ghetto.

"Those who deplore a view of the university in terms of its powerful political role in American society must account for the institution's use of political power in its own terms, for its own purposes. I have come to feel lately—partly, I guess, because of the legal reasoning styles to which I have been exposed—that those playing around with the structure of their universities these days are playing with tinker toys. New committees, new senates and new student-participation formulae do not necessarily mean that anything has changed. Indeed, if Berkeley, Columbia, Harvard and Chicago are valid examples, restructuring turns out to be one of the brilliant new inventions for sustaining the status quo. The vested interests and essential privileges involved in current efforts to restructure the university have yet completely to surface. A substantial part of our melting iceberg is still below the waterline.

"That part of the student critique of the university which most deserves our attention bears upon what we teach, how we teach it, and the terms on which it is taught. One of the interesting things their critique points out is that our building programs, corporate investments, relationships to the immediate community and to the society, and our views of citizenship inside the university, all turn out to be projections and applications of what *we* call or have called education. Their critique suggests the perfectly absurd conclusion that there is a relationship between their long hair and our long war, between being a nurse and being a Negro, between the freshman political-science course and the pollution of fresh air, between education for freedom and

being free. Obviously, the contemporary American student activist is crazy.

"We have probably made a mistake by revealing to our students that there really is too much to know, and only one way to learn it—our way. They have come to accept this as gospel, and it has encouraged them to view curriculum development as essentially a sophisticated art of selection, interpretation and emphasis in which *they* have a vested interest. Understanding this, naturally they have begun to ask the key political questions bearing upon *our* vested interests and privileges: What experience and talent should be empowered to select? Who should be empowered to employ those who will interpret, and to deploy the wealth required to support the enterprise?

"Obviously the control over who will be kept out and over punishment-and-reward systems inside is extremely important. While our students still generally concede that the older adults who teach them may know something they don't, they are also asserting the uniqueness of their own experience, claiming that they may know something which those now in charge don't. They have returned to the kindergarten level to rediscover a principle long revered in American education—that the student plays a positive and active role, that he has something definite and essential to contribute to his own education.

"The young—suspended precariously in a society obsessed by Vietnam violence, race violence, crime violence and culture violence—are restating the eternal questions about education: What is important to learn, and how may people best learn together? Regarding these enduring questions, they are also asking the eternal question of a society which officially encourages its young to grow up free (even while keeping them in bondage), namely: Who shall judge? Regarding the problems

these questions suggest, academic tradition responds through an uptight delineation of jurisdictions and powers within the university.

. . . . .

"Today's campus disruptions were born in the years 1776 to 1787. Although the mind of Thomas Jefferson was anchored in the traditions of Heidelberg, Oxford, Paris, Bologna, Rome, Greece, the religions of the early Christians and the ancient Hebrews, minds like his transformed the old into something quite new, as in the case of his proposal for a university in Virginia. What was created then was not, of course, the latest thing, nor was it necessarily the Truth. But it was an adventure, a genuine new departure, unlike most of the institutions of learning we have created in this country since the Morrill Act—that is, most of our higher-education establishment.

"The traditions of the university in the West are anti- if not counter-revolutionary. Operating within these traditions, the university has produced revolutionary knowledge, but institutionally the uses of the knowledge have been directed mainly toward the confirmation of the status quo, particularly the political and cultural status quo. The themes of peace, integration, equality, freedom and the humane uses of knowledge are ones which traditionally fall beyond the purview of the university.

"But in principle the main themes of our society run counter to this deployment of knowledge. In spite of Vietnam, poverty, racism and the overbearing logic of our technology—in spite of Bedford-Stuyvesant—the main themes of our country, in principle, were and still are revolutionary. They are reflected in such questions as these: Can the revolutionary knowledge developed in the universities be used humanely, to conform with what Jefferson and his colleagues apparently meant? What

does equality mean, and whatever it meant or means, can we still achieve a version of it consistent with this adventure? Are reason and democracy really consistent? Is war in behalf of peace, given what we know now, realistic? Can Negroes who were once property suddenly become people? Are some genocides more decent than others, some cesspools more fragrant than others?

"In any event, I *know* that Bedford-Stuyvesant is crammed full of red-white-and-blue Americans. They really believe that we ought to practice what we preach, and that's the problem. We've oversold America to ourselves, and so many of my very good friends—looking at the street violence and the circuses in the courts and on the campuses—who believe we confront a deeply un-American phenomenon, who think we face a serious threat to American values, completely misread what is going on there. We face a vibrant, far-reaching reassertion of what this country claims, what it has always claimed it is." W. Birenbaum, Something For Everybody Is Not Enough 67–69, 248–249.

MR. JUSTICE REHNQUIST, concurring in the result.

While I do not subscribe to some of the language in the Court's opinion, I concur in the result that it reaches. As I understand the Court's holding, the case is sent back for reconsideration because respondents may not have made it sufficiently clear to petitioners that the decision as to recognition would be critically influenced by petitioners' willingness to agree in advance to abide by reasonable regulations promulgated by the college.

I find the implication clear from the Court's opinion that the constitutional limitations on the government's acting as administrator of a college differ from the limitations on the government's acting as sovereign to enforce its criminal laws. The Court's quotations from *Tinker*

v. *Des Moines Independent School District*, 393 U. S. 503, 506 (1969), to the effect that First Amendment rights must always be applied "in light of the special characteristics of the . . . environment," and from *Esteban* v. *Central Missouri State College*, 415 F. 2d 1077, 1089 (CA8 1969), to the effect that a college "may expect that its students adhere to generally accepted standards of conduct," emphasize this fact.

Cases such as *United Public Workers* v. *Mitchell*, 330 U. S. 75 (1947), and *Pickering* v. *Board of Education*, 391 U. S. 563 (1968), make it equally clear that the government in its capacity as employer also differs constitutionally from the government in its capacity as the sovereign executing criminal laws. The Court in *Pickering* said:

> "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U. S., at 568.

Because of these acknowledged distinctions of constitutional dimension based upon the role of the government, I have serious doubt as to whether cases dealing with the imposition of criminal sanctions, such as *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969), *Scales* v. *United States*, 367 U. S. 203 (1961), and *Yates* v. *United States*, 354 U. S. 298 (1957), are properly applicable to this case dealing with the government as college administrator. I also doubt whether cases dealing with the prior restraint imposed by injunctive process of a court, such as *Near* v. *Minnesota*, 283 U. S. 697 (1931), are precisely comparable to this case, in which a typical sanction imposed was the requirement that the group abandon its plan to meet in the college coffee shop.

Prior cases dealing with First Amendment rights are not fungible goods, and I think the doctrine of these cases suggests two important distinctions. The government as employer or school administrator may impose upon employees and students reasonable regulations that would be impermissible if imposed by the government upon all citizens. And there can be a constitutional distinction between the infliction of criminal punishment, on the one hand, and the imposition of milder administrative or disciplinary sanctions, on the other, even though the same First Amendment interest is implicated by each.

Because some of the language used by the Court tends to obscure these distinctions, which I believe to be important, I concur only in the result.

MANCUSI, CORRECTIONAL SUPERINTENDENT *v.* STUBBS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 71-237. Argued April 17, 1972—Decided June 26, 1972

New York State sentenced respondent as a second offender, based on his 1964 felony conviction in Tennessee. Respondent's petition for federal habeas corpus, denied by the District Court, was granted by the Court of Appeals, which concluded that the Tennessee conviction violated his Sixth and Fourteenth Amendment right to confront witnesses and thus was not available as the predicate for a "second offender" stiffer punishment. The State then resentenced respondent to the same sentence, based upon still another conviction in Texas. *Held:*

1. New York State's resentencing of respondent did not moot the instant case since the respondent's appeal involving the validity of the Texas conviction is still in the New York state courts, and therefore New York State has a present interest in the availability of the Tennessee conviction as a predicate for the stiffer punishment. Pp. 205–207.

2. Upon discovering that a State's witness had removed himself permanently to a foreign country, the State of Tennessee was powerless to compel his attendance at respondent's second trial, either through its own process or through established procedures depending upon the voluntary assistance of another government; the resultant predicate of unavailability was sufficiently strong not to warrant a federal habeas corpus court's upsetting the State's determination that the witness was not available. *Barber* v. *Page*, 390 U. S. 719, distinguished. Pp. 207–213.

3. Where a State's witness is bona fide unavailable, the requirements of the Confrontation Clause are met when prior-recorded testimony of the witness is admitted, as occurred in the 1964 trial, if that prior testimony bears "indicia of reliability" that would afford "the trier of fact a satisfactory basis for evaluating the truth of the prior statement." *Dutton* v. *Evans*, 400 U. S. 74, 89. Pp. 213–216.

442 F. 2d 561, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which

BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. MARSHALL, J., filed a dissenting opinion, in Part II of which DOUGLAS, J., joined, *post*, p. 216.

Maria L. Marcus, Assistant Attorney General of New York, argued the cause for petitioner. With her on the brief were *Louis J. Lefkowitz*, Attorney General, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Stanley L. Kantor*, Deputy Assistant Attorney General.

Bruce K. Carpenter (for Court appointment of counsel, see 406 U. S. 941) argued the cause and filed a brief for respondent.

Melvin Bressler filed a brief for the District Attorney of Monroe County, New York, as *amicus curiae*.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Stubbs was convicted of a felony in a New York State court and sentenced as a second offender under the laws of that State by reason of a prior Tennessee murder conviction obtained in 1964. He thereafter sought federal habeas corpus, claiming that the Tennessee conviction was had in violation of his Sixth and Fourteenth Amendment right to confront witnesses against him, and thus could not be used by New York as the predicate for a stiffer punishment. The District Court denied habeas corpus, but the Court of Appeals reversed, 442 F. 2d 561 (CA2 1971). We granted certiorari, 404 U. S. 1014, and reverse for the reasons hereinafter stated.

I

Prior to our consideration of the merits it is necessary to deal with a suggestion that because petitioner did not seek a stay of the mandate of the Court of Appeals, but rather obeyed it and resentenced Stubbs, this case is therefore moot. The parties agreed at oral argument that Stubbs upon resentencing in New York had received

the same sentence, based upon still another conviction in Texas. However, he was appealing from that sentence on grounds that the Texas conviction was constitutionally infirm, and that appeal has not run its course even through the state courts.

Until it can be said with certainty that the New York courts may validly resentence respondent to the same term as they imposed prior to the decision of the Court of Appeals now under review here, petitioner continues to have an interest in the availability of the Tennessee conviction as a support for second-offender sentencing of respondent. Petitioner's obedience to the mandate of the Court of Appeals and the judgment of the District Court does not moot this case.[1] In *Bakery Drivers* v. *Wagshal*, 333 U. S. 437 (1948), the union appealed from an injunction issued by the United States District Court

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[1] The dissent states that this case is controlled by *SEC* v. *Medical Committee*, 404 U. S. 403 (1972). In that case, respondent committee had requested Dow Chemical to place the committee's proposed resolution on the proxy statement for the annual meeting of Dow Chemical stockholders. Dow Chemical initially refused the request, and the committee thereupon invoked the aid of the SEC to bring suit against Dow Chemical to compel inclusion of the proposal. The SEC refused to bring suit, and the committee then succeeded in having the agency's refusal set aside by the Court of Appeals. While review of this latter action was pending here, Dow Chemical acceded to the committee's request. The committee thereby accomplished the purpose for which it sought ancillary assistance from the SEC, not because of compliance by the SEC with the judgment under review, but because of the action of Dow Chemical, which was not required to do anything by that judgment.

There would be a rough parallel between our case and *SEC* v. *Medical Committee* if, pending review here of the ruling of the Court of Appeals in favor of Stubbs, the Governor of New York should pardon Stubbs. But, on the facts we have before us now, the mootness issue is controlled by *Bakery Drivers* v. *Wagshal*, 333 U. S. 437 (1948), and *Dakota County* v. *Glidden*, 113 U. S. 222 (1885), rather than by *SEC* v. *Medical Committee*.

on the ground that it had been issued in violation of the provisions of the Norris-LaGuardia Act. Dealing with a "preliminary claim" of mootness in that case, the Court said:

> "The claim of mootness is also based on an affidavit stating that after dismissal of the appeal by the Court of Appeals, the union lifted its boycott. Since the record does not show that a stay of the injunction was granted pending action in this Court, we must assume that the union's action was merely obedience to the judgment now here for review. We therefore turn to the merits." 333 U. S., at 442.

Much earlier the Court had stated a similar view of mootness in these circumstances:

> "There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money. And a defendant in an action of ejectment may bring a writ of error, and failing to give a supersedeas bond, may submit to the judgment by giving possession of the land, which he can recover if he reverses the judgment by means of a writ of restitution. In both these cases the defendant has merely submitted to perform the judgment of the court, and has not thereby lost his right to seek a reversal of that judgment by writ of error or appeal." *Dakota County* v. *Glidden,* 113 U. S. 222, 224 (1885).

Under these authorities the case is not moot, and we turn to the merits.

II

In July 1954, respondent was convicted in the Tennessee trial court of murder in the first degree, assault with intent to murder, and two counts of kidnaping.

The jury impaneled for that trial could have concluded from the evidence presented to it that respondent, a few days after his release from a Texas penitentiary in June 1954, kidnaped Mr. and Mrs. Alex Holm and forced them at gunpoint to accompany him in their car. Stubbs drove the car and sat in the front seat, while the Holms sat in the back seat. Mr. Holm testified that somewhere east of Blountville, Tennessee, Stubbs, without saying anything, shot him twice in the head and shot and killed Mrs. Holm. Stubbs then left the car, obtained a ride as a hitchhiker, and was ultimately arrested at a roadblock. At the time of his arrest, Stubbs explained the blood on his clothing as having resulted from his having fallen off a cliff while fishing.

Stubbs took the stand in his own defense, admitted that he had kidnaped the Holms at gunpoint, and that as he drove the Holms' car, with them in the back seat, he at intervals pointed the gun in Mrs. Holm's face. He testified that during the ride he apologized for forcing a ride; that the Holms then assured him they would let him out at Bristol, Tennessee, and would not cause him any trouble; and that he therefore laid the pistol on the front seat of the car. He also testified that near Bristol, Tennessee:

> "It seems awful strange, but everything just seemed to be awful still and I remember a tree and it just seemed to come up just like that in clear focus, but in a reddish haze. I mean there was no pain or nothing. . . . I felt a sharp pain that seem to start in my head and go all the way down through me and I reached up with both hands and I heard this loud roar, bang . . . Stuff started running down my face and down my shirt and all that I could think of that he has got the gun. . . . I just went outside through the car door. . . ."

After that, Stubbs testified, "everything went black."

Nine years after his state court trial for murder, Stubbs sought release on federal habeas corpus from the United States District Court for the Middle District of Tennessee.

He successfully urged upon that court the contention that he had been denied the effective assistance of counsel in this 1954 trial because counsel had been appointed for him only four days before the trial took place. *Stubbs* v. *Bomar,* Civil Action No. 3585 (MD Tenn. 1964). The State of Tennessee then elected to retry him, and did so in 1964. By that time Holm, who had been born in Sweden but had become a naturalized American citizen, had returned to Sweden and taken up permanent residence there. Tennessee issued a subpoena that was sent to Texas authorities in an attempt to serve Holm at his last known United States address. No service having been obtained, the State at trial called Holm's son as a witness and elicited from him the fact that his father now resided in Sweden. Over appropriate objection on constitutional grounds, the Tennessee trial judge then permitted Holm's testimony at the earlier trial to be read to the jury. Stubbs again took the stand, recited his version of the events, and was again convicted. This conviction was in due course affirmed by the Supreme Court of Tennessee. *Stubbs* v. *State,* 216 Tenn. 567, 393 S. W. 2d 150 (1965).

Respondent has challenged the present second-offender sentence that was imposed upon him by the New York courts on the ground that his 1964 conviction upon retrial was constitutionally infirm because he was denied his Sixth and Fourteenth Amendment right to confront the witness Holm. The Court of Appeals sustained this contention, relying on this Court's opinion in *Barber* v. *Page,* 390 U. S. 719 (1968).

In *Barber*, a prospective witness for the prosecution in an Oklahoma felony trial was incarcerated in a federal prison in Texas. The court there said:

> "We start with the fact that the State made absolutely no effort to obtain the presence of Woods at trial other than to ascertain that he was in a federal prison outside Oklahoma. It must be acknowledged that various courts and commentators have heretofore assumed that the mere absence of a witness from the jurisdiction was sufficient ground for dispensing with confrontation on the theory that 'it is impossible to compel his attendance, because the process of the trial Court is of no force without the jurisdiction, and the party desiring his testimony is therefore helpless.' 5 Wigmore, Evidence § 1404 (3d ed. 1940).
>
> "Whatever may have been the accuracy of that theory at one time, it is clear that at the present time increased cooperation between the States themselves and between the States and the Federal Government has largely deprived it of any continuing validity in the criminal law. For example, in the case of a prospective witness currently in federal custody, 28 U. S. C. § 2241 (c)(5) gives federal courts the power to issue writs of habeas corpus *ad testificandum* at the request of state prosecutorial authorities. [Citations omitted.] In addition, it is the policy of the United States Bureau of Prisons to permit federal prisoners to testify in state court criminal proceedings pursuant to writs of habeas corpus *ad testificandum* issued out of state courts. . . .
>
> "In this case the state authorities made no effort to avail themselves of either of the above alternative means of seeking to secure Woods' presence at peti-

tioner's trial." (Footnotes omitted.) *Id.*, at 723–724.

Because the State had made no attempt to use one of these methods to obtain the attendance of the witness at trial, the Court reversed the conviction on that ground without considering whether the testimony taken at the preliminary hearing was subject to cross-examination. The Court said:

> "Moreover, we would reach the same result on the facts of this case had petitioner's counsel actually cross-examined Woods at the preliminary hearing. See *Motes* v. *United States,* 178 U. S. 458 (1900). The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial. While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case." 390 U. S., at 725–726.

In this case, of course, Holm was not merely absent from the State of Tennessee; he was a permanent resident of Sweden. Respondent argues that Tennessee might have obtained Holm as a trial witness by attempting to invoke 28 U. S. C. § 1783 (a), which provided as of the time here relevant that:

> "A court of the United States may subpoena, *for appearance before it*, a citizen or resident of the

> United States who . . . is beyond the jurisdiction of the United States and whose testimony in a criminal proceeding is desired by the Attorney General. . . ." (1958 ed.) (Emphasis supplied.)

We have been cited to no authority applying this section to permit subpoena by a federal court for testimony in a state felony trial, and certainly the statute on its face does not appear to be designed for that purpose.[2]

The Uniform Act to secure the attendance of witnesses from without a State, the availability of federal writs of habeas corpus *ad testificandum,* and the established practice of the United States Bureau of Prisons to honor state writs of habeas corpus *ad testificandum,* all supported the Court's conclusion in *Barber* that the State had not met its obligations to make a good-faith effort to obtain the presence of the witness merely by showing that he was beyond the boundaries of the prosecuting State. There have been, however, no corresponding developments in the area of obtaining witnesses between this country and foreign nations. Upon discovering that Holm resided in a foreign nation, the State of Tennessee, so far as this record shows, was powerless to compel his attendance at the second trial, either through its own process or through established procedures depending on the voluntary assistance of another government. Cf. *People* v. *Trunnell,* 19 Cal. App. 3d 567, 96 Cal. Rptr. 810 (1971). We therefore hold that the predicate of unavailability was sufficiently stronger here than in *Barber* that a federal habeas court was not warranted

[2] Stubbs argues that the 1964 amendment to 28 U. S. C. § 1783, authorizing a subpoena to bring a witness "before a person or body designated by" the District Court, sheds a different light on this case. That amendment was not available to the Tennessee authorities for Stubbs' 1964 trial, and therefore we have no occasion to decide whether it would afford assistance to state authorities on the facts represented by this case.

in upsetting the determination of the state trial court as to Holm's unavailability. Before it can be said that Stubbs' constitutional right to confront witnesses was not infringed, however, the adequacy of Holm's examination at the first trial must be taken into consideration.

In addition to *Barber* v. *Page*, recent decisions of this Court that have dealt at some length with the requirements of the Confrontation Clause are *California* v. *Green*, 399 U. S. 149 (1970), and *Dutton* v. *Evans*, 400 U. S. 74 (1970). The focus of the Court's concern has been to insure that there "are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant," *Dutton* v. *Evans*, *supra*, at 89, and to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement," *California* v. *Green*, *supra*, at 161. It is clear from these statements, and from numerous prior decisions of this Court, that even though the witness be unavailable his prior testimony must bear some of these "indicia of reliability" referred to in *Dutton*.

At least since the decision of this Court in *Mattox* v. *United States*, 156 U. S. 237 (1895), prior-recorded testimony has been admissible in appropriate cases. The circumstances surrounding the giving of Alex Holm's testimony at the 1954 trial were significantly more conducive to an assurance of reliability than were those obtaining in *Barber* v. *Page*, *supra*. The 1954 Tennessee proceeding was a trial of a serious felony on the merits, conducted in a court of record before a jury, rather than before a magistrate.[3] Stubbs was represented by coun-

[3] The significant difference between the nature of examination at a preliminary hearing and at a trial on the merits is discussed both in *Barber* v. *Page*, 390 U. S. 719 (1968), and in MR. JUSTICE BRENNAN'S dissenting opinion in *California* v. *Green*, 399 U. S. 149, 196–199 (1970).

sel who could and did effectively cross-examine prosecution witnesses.

Stubbs urges that because the 1954 conviction was itself overturned by a federal habeas court on a finding of ineffective assistance of counsel, that court must necessarily have concluded that the cross-examination of Holm conducted by such counsel likewise fell short of constitutional standards. The federal habeas judge in *Stubbs* v. *Bomar, supra,* however, rested his determination on an apparent *per se* rule of ineffective assistance that was conclusively presumed from the short interval between the time of counsel's appointment and the date of the trial. If the habeas court had rendered its decision after our holding in *Chambers* v. *Maroney,* 399 U. S. 42 (1970), which disapproved any such *per se* rule, it might have addressed itself to the effectiveness of the examination of the witness Holm. But it did not in fact do so. When Stubbs appealed his 1964 conviction to the Supreme Court of Tennessee, that court in affirming the judgment expressly determined that the prior cross-examination of Holm had been adequate. *Stubbs* v. *State,* 216 Tenn. 567, 393 S. W. 2d 150 (1965). Whatever might be the case in other circumstances, the State of New York was not bound under any theory of *res judicata* by *Stubbs* v. *Bomar* as to the efficacy of the prior cross-examination of the witness Holm.

Stubbs also contends that even though the prior determination may not be binding upon subsequent review, the fact that counsel was appointed only four days before trial necessarily requires a finding that the cross-examination of Holm was constitutionally inadequate. Counsel for Stubbs at the 1964 trial placed in the record a list of 12 questions not asked of Holm in 1954, which he said he would have asked had the witness been present at the second trial. With one exception these were directed to the events leading up to and surrounding the shooting. Though not asked

in haec verba in 1954, they were nonetheless adverted to in the earlier cross-examination. No one defense counsel will ever develop precisely the same lines of inquiry or frame his questions in exactly the words of another, but from this record counsel at the retrial did not in his proffer show any new and significantly material line of cross-examination that was not at least touched upon in the first trial.

The Court of Appeals concluded that the cross-examination had been inadequate. It reached this conclusion, at least in part, because it felt that Holm could have been questioned about whether Stubbs, although originally having kidnaped the Holms at gunpoint, later became in effect their guest. Parts of Stubbs' own testimony presented that version of the events to the jury, and the Second Circuit thought it significant because even if Stubbs fired his pistol accidentally, he might still have been found guilty of felony murder unless the felony of kidnaping had ended. Under this theory, if Stubbs had during the trip been transmogrified from a kidnaper into a guest, at least the argument to the jury as to whether the kidnaping had ended before the shooting would have been strengthened by any support Holm's testimony might have given to this notion.

The Tennessee trial court, however, did not charge that the jury could convict Stubbs of felony murder as a result of a death occurring during a kidnaping. Its charge authorized conviction upon a finding of premeditated murder, or upon a finding of murder during the commission of robbery.[4] The failure to elicit from

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[4] This was in accord with the Tennessee felony-murder statute which provides:

"Every murder . . . committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, or larceny, is murder in the first degree." Tenn. Code Ann. § 39-2402.

Holm his own views as to whether Stubbs had become a guest in the Holm car prior to the time that he turned from the front seat, shot Mr. Holm, and killed Mrs. Holm—however interesting they might have been to hear—could not have prejudiced Stubbs' case as to any issue that the jury was authorized to deliberate under the trial judge's charge.

Since there was an adequate opportunity to cross-examine Holm at the first trial, and counsel for Stubbs availed himself of that opportunity, the transcript of Holm's testimony in the first trial bore sufficient "indicia of reliability" and afforded " 'the trier of fact a satisfactory basis for evaluating the truth of the prior statement,' " *Dutton* v. *Evans*, 400 U. S., at 89. The witness Holm, consistently with the requirement of the Confrontation Clause, could have been and was found by the trial court to be unavailable at the time of the second trial. There was, therefore, no constitutional error in permitting his prior-recorded testimony to be read to the jury at that trial, and no constitutional infirmity in the judgment of conviction resulting from that trial that would prevent the New York courts from considering that conviction in sentencing Stubbs as a second offender. The judgment of the Court of Appeals is therefore

Reversed.

MR. JUSTICE MARSHALL, dissenting.

I

I would dismiss the writ in this case as improvidently granted. The question presented to the courts below concerns the constitutional validity of a 1964 Tennessee conviction. The New York courts had relied on that conviction to sentence respondent as a multiple offender, after his conviction in 1966 for a New York offense. It was conceded at oral argument, however, that New York has no present interest whatever in

that Tennessee conviction. For, after the United States Court of Appeals held that it was constitutionally defective, New York substituted for the Tennessee conviction an earlier Texas conviction, and reinstated precisely the same enhanced sentence it had previously imposed.[1]

In determining that this case is nevertheless appropriate for adjudication here, the Court seems to rely on two separate factors. First, it reasons that the event that seems to moot the case—the resentencing—was merely the State's obedience to the adverse judgment below, and for that reason cannot moot the controversy. And, second, it reasons that the resentencing may prove to be defective as a matter of law, that New York may in the future wish to rely on the Tennessee conviction again, if the Texas conviction should prove to have defects of its own.

The first proposition falls wide of the mark in this case. It is well established that an unsuccessful litigant does not moot his case by complying with an unfavorable judgment pending the disposition of his appeal. Thus, a debtor does not moot his case by paying the judgment against him *pendente lite*. *Dakota County* v. *Glidden*, 113 U. S. 222 (1885). And if a union is enjoined from boycotting or striking at a particular store, the union does not moot the case by lifting the boycott or strike *pendente lite*. *Bakery Drivers* v. *Wag-*

[1] Under the then-applicable New York sentencing statute, former N. Y. Penal Law § 1941, one prior conviction was sufficient to trigger the recidivist sentencing provisions, and Stubbs received the maximum authorized recidivist sentence. New York has subsequently amended its law to increase the maximum recidivist sentence, and to provide that two prior convictions are necessary to trigger the recidivist statute, N. Y. Penal Law § 70.10. The new provisions do not, however, apply to this case, because the underlying New York conviction here was obtained before the effective date of the new statute. N. Y. Penal Law § 5.05.

shal, 333 U. S. 437 (1948). But that principle does not protect the unsuccessful litigant who goes beyond what is required of him, and obtains relief in some way not prohibited by the judgment against him. Thus, the debtor *does* moot his case by entering into a compromise in settlement of the debt. *Dakota County* v. *Glidden,* 113 U. S., at 224–227. And the union might well moot its case if all the striking employees left the store and obtained other employment elsewhere.

This case would come within the principle of *Dakota County* and *Bakery Drivers,* if New York had simply abandoned, temporarily, its attempt to impose an enhanced recidivist sentence, pending review of the judgment below. But New York did more than merely submit to the decision below; it found a complete substitute for the result it had sought in the Court of Appeals, and the result it continues to seek here.[2] By reversing the judgment below, this Court gives New York no relief it has not already obtained.

The Court offers a second reason to disregard the resentencing in this case, however, and that reason is perhaps independent of the first. The Court argues that the Texas conviction, and the resentencing based on it, may be found invalid in other proceedings, in which case New York may wish to revive its interest in the Tennessee conviction. Thus, the argument rests on the Court's estimate that the controversy that gave

[2] The Court seeks to distinguish *SEC* v. *Medical Committee,* 404 U. S. 403 (1972), on the ground that in that case the action relied on to moot the case was taken by a third party rather than by a litigant. I can see no relevant difference, however, between the action of a third party, and the action of a litigant which goes beyond mere *pendente lite* compliance with the court order, so long as that action gives the litigant the relief he seeks. If burning down a building will moot a case, surely that is so whether the fire is set by a litigant or a lightning bolt, though the litigant may, of course, be subject to sanctions quite apart from the case he has rendered moot.

rise to this litigation has a substantial probability of recurring. That analysis might in my view carry considerable weight, if it were applied uniformly in all cases. But this Court has regularly refused to adjudicate the claims of litigants who argue that illegal action will probably harm them in the future. *E. g., Socialist Labor Party* v. *Gilligan*, 406 U. S. 583 (1972); *SEC* v. *Medical Committee*, 404 U. S. 403 (1972).[3] Moreover, in this case the Court can find that the controversy will probably recur only by presuming that the Texas conviction is probably invalid. Such a presumption flies in the face of the principle that state convictions are ordinarily presumed valid.[4] The Court betrays a surprising lack of confidence in the criminal processes of our States, for which there is no warrant in this record.

In these circumstances, the possibility that this controversy will be revived is too remote and speculative to keep the case alive under established precedents. It is certainly too remote and speculative to warrant invoking the discretionary certiorari jurisdiction of this Court.

II

Because the Court reaches out to decide the merits of this case, I think it appropriate to state my views on that subject as well.

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[3] Indeed, the claim we rejected in *SEC* is closely analogous to the claim here. In each case, events subsequent to the decision below removed the occasion for present conflict between the parties, but it was alleged that within a short time the conflict could be expected to recur. In *SEC*, the Court found that allegation too speculative to keep the controversy alive.

[4] Even when an appeal is pending, see, *e. g., Bloch* v. *United States*, 226 F. 2d 185, 188 (CA9 1955), cert. denied, 350 U. S. 948 (1956); *United States* v. *Empire Packing Co.*, 174 F. 2d 16, 20 (CA7), cert. denied, 337 U. S. 959 (1949); Proposed Rules of Evidence for the United States District Courts § 609 (e) (1972), and Advisory Committee's Note.

Respondent was convicted of murder in Tennessee after a trial in which the principal prosecution witness, one Alex Holm, did not appear. Instead, Holm's testimony was introduced through a transcript of a previous trial on the same charge. The State made absolutely no effort to secure Holm's presence at the second trial, relying wholly on the claim that Holm was unavailable because he had become a resident of Sweden. The Court today concludes that the State did not thereby deny Stubbs his right "to be confronted with the witnesses against him," guaranteed by the Sixth and Fourteenth Amendments. To reach that result, the Court necessarily distinguishes our holding in *Barber* v. *Page*, 390 U. S. 719 (1968), on untenable grounds, and utterly ignores its rationale.

In *Barber* v. *Page*, the petitioner had been convicted on the basis of testimony introduced through a transcript of a preliminary hearing. The witness in question was incarcerated in a federal prison. We held that the State could not, consistent with constitutional requirements, use that transcript in lieu of the witness himself unless two conditions were met: (1) the witness was shown to be actually unavailable to testify at trial, and (2) the witness had been adequately confronted and cross-examined at the prior hearing. In *Barber* we concluded that neither condition had been met; the State had failed to make a good-faith effort to secure the presence of the witness at trial, and hence it could not be said that the witness was unavailable; moreover, the preliminary hearing did not afford an adequate pretrial opportunity for confrontation and cross-examination.

The Court purports to apply the two-part test of *Barber* to the facts of this case. It devotes considerable space to the second part of the test, analyzing the opportunity for confrontation and cross-examination of Holm at the first trial of Stubbs, and concluding that the

opportunity there was significantly greater than at the preliminary hearing in *Barber*. The Court's distinction for this purpose between a preliminary hearing and a prior trial is tenable, in my view, although on the peculiar facts of this case the Court's conclusion is somewhat troublesome. But the Court fails totally to explain how the first part of the *Barber* test is satisfied here. On that question, the Court has only this to say: "the predicate of unavailability was sufficiently stronger here than in *Barber* that a federal habeas court was not warranted in upsetting the determination of the state trial court as to Holm's unavailability."

The difficulty with that position is that there never has been any factual inquiry resulting in a determination as to Holm's unavailability. Rather, the courts have consistently presumed his unavailability from the bare fact that he lives in Sweden. The Tennessee Supreme Court thought it was enough that Holm was out of the jurisdiction of the United States, beyond the reach of compulsory process, *Stubbs* v. *State*, 216 Tenn. 567, 574–575, 393 S. W. 2d 150, 153–154 (1965), as did the dissenting judge in the United States Court of Appeals, 442 F. 2d 561, 565 (1971). Apparently this Court takes the same view. But in *Barber* v. *Page* we squarely rejected any such presumption of unavailability. In that case, the claim was made that the court had no power to compel the absent witness to appear. We held that nevertheless the State was obliged to make a good-faith effort to secure his appearance, for " 'the possibility of a refusal is not the equivalent of asking and receiving a rebuff.' " 390 U. S., at 724, quoting the decision below, 381 F. 2d 479, 481 (CA10 1966) (Aldrich, J., dissenting). As we said in *Barber:*

> "In short, a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authori-

ties have made a good-faith effort to obtain his presence at trial." 390 U. S., at 724–725.

The Court seeks to distinguish *Barber* on the ground that in that case the absent witness was a federal prisoner, and while the State had no power to compel his appearance, it could at least have sought the cooperation of the federal prison authorities who did have such power. Here, on the other hand, the absent witness was a resident of a foreign nation, and hence it is argued that even federal authorities would have no power to help. In support of that analysis, the Court seems to place substantial reliance on the fact that at the time of Stubbs' trial, the federal courts had statutory power to subpoena American citizens living abroad, but that power was apparently available only to compel their appearance before federal courts. Act of June 25, 1948, c. 646, 62 Stat. 949, 28 U. S. C. § 1783 (1958 ed.). If the Court's decision today does in fact rest on the lack of federal power to compel the appearance of Holm at a state trial, then the holding in this case is of very limited significance. For less than three months after the trial of Stubbs, Congress amended § 1783 to provide:

> "A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, *or before a person or body designated by it*, of a national or resident of the United States who is in a foreign country . . . ." Act of Oct. 3, 1964, Pub. L. No. 88–619, § 10 (a), 78 Stat. 997 (emphasis added).

Since October 3, 1964, then, it appears that the federal courts have had the power to assist state courts in securing the presence of witnesses like Alex Holm, and hence for trials occurring since that date, *Barber* would seem to control.

I cannot agree, however, that if neither state nor federal authorities had the power to compel Holm's appearance, that fact relieved the State of its obligation to make a good-faith effort to secure his presence. It simply reduced the likelihood that any effort would succeed. The State's obligation would hardly be framed in terms of "good-faith effort" if that effort were required only in circumstances where success was guaranteed. If, as the Court contends, it is more difficult to produce at trial a resident of Sweden than a federal prisoner, that fact might justify a failure to produce the witness; it cannot justify a failure even to try. At a minimum, the State could have notified Mr. Holm that the trial was scheduled, and invited him to come at his own expense. Beyond that, it could have offered to pay his expenses. Finally, it could have sought federal assistance in invoking the cooperation of Swedish authorities, as a matter of international comity.

As in *Barber*, "so far as this record reveals, the sole reason why [the witness] was not present to testify in person was because the State did not attempt to seek his presence. The right of confrontation may not be dispensed with so lightly." 390 U. S., at 725.

I respectfully dissent.

MR. JUSTICE DOUGLAS joins in Part II of this opinion.

COMBS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 71-517. Argued April 11, 1972—Decided June 26, 1972

Petitioner was convicted of receiving, possessing, and concealing whiskey known by him to have been stolen from an interstate shipment. Prior to his trial, the District Court had denied a motion to suppress the whiskey from evidence on the contention that there had been no showing of probable cause to support issuance of the warrant authorizing the search for the whiskey. The petitioner raised only the validity of the warrant on his appeal, but the Court of Appeals held that he lacked standing to challenge the legality of the search, which had occurred on his father's farm where petitioner was not living or present at the time of the search. *Held:* Since the Government now suggests that the warrant was invalid, and since the record is inadequate for a determination of whether petitioner had an interest in the searched premises that would afford him standing under *Mancusi* v. *DeForte*, 392 U. S. 364, to challenge the legality of the search, the judgment of the Court of Appeals is vacated and the case remanded for further proceedings.

446 F. 2d 515, vacated and remanded.

James N. Perry argued the cause for petitioner. With him on the brief was *William F. Hopkins.*

William Bradford Reynolds argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Petersen, Beatrice Rosenberg,* and *Roger A. Pauley.*

PER CURIAM.

We granted certiorari on claims that evidence introduced against petitioner was obtained through an unlawful search that petitioner has standing to challenge. The Government now suggests that the warrant authorizing the search was invalid, but that further factual deter-

minations are required to resolve the question of petitioner's standing to challenge the admission in evidence of the allegedly stolen goods seized by Government agents.

Petitioner and his father were convicted after a joint trial [1] under an indictment charging them with having violated 18 U. S. C. § 659 [2] by receiving, possessing, and concealing 26 cases of tax-paid whiskey known by them to have been stolen from an interstate shipment. The Government's evidence at trial tended to show that petitioner delivered 40 cases of whiskey to the Newport, Kentucky, home of a Mrs. Ballard, who had previously expressed her willingness to buy it. The day after the delivery, Mrs. Ballard, having sold some of the whiskey but having thereafter heard that it was stolen property, telephoned petitioner and told him to remove the remainder of the whiskey from her home. Petitioner and one Martin then moved the whiskey to the home of petitioner's estranged wife; a few days later, however, petitioner telephoned Martin and told him that "the heat was on" and the whiskey would have to be moved once again. The two men then transported the whiskey to

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[1] Both men were convicted, but petitioner's father did not appeal; another codefendant at the trial was petitioner's brother, who was acquitted on a related charge.

[2] Section 659 provides as follows:

"Whoever . . . unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any . . . railroad car . . . or other vehicle, or from any . . . station house, platform or depot . . . with intent to convert to his own use any goods or chattels moving as or which are a part of . . . an interstate or foreign shipment . . . ; or

"Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; . . .

. . . . . .

"Shall . . . be fined not more than $5,000 or imprisoned not more than ten years, or both . . . ."

Hazard, Kentucky, where they stored it in a shed on a farm owned by petitioner's father.

Sometime later, Martin told an FBI agent of the stolen whiskey; when the agent in turn passed the information on to the Kentucky state police, the latter obtained a warrant authorizing a search for, and seizure of, the whiskey at the property of petitioner's father. The warrant was supported by an affidavit, which the Government now suggests was insufficient under the holding of *Aguilar* v. *Texas*, 378 U. S. 108 (1964). Armed with that warrant, the state police went to the farm owned by petitioner's father and conducted a search, which led to the discovery and seizure of 26 cases of whiskey identified as having been stolen from a railroad shipment intended for delivery to the Michigan Liquor Control Board. Petitioner was not living on his father's property, nor was he present there when the search and seizure took place.

Prior to trial, the defendants jointly moved the District Court to suppress the whiskey from evidence on the ground that there was no showing of probable cause to support the issuance of the warrant. The District Court, following an evidentiary hearing,[3] denied the motion on the merits, and the evidence was subsequently introduced at trial. Following the conviction of petitioner and his father, only the petitioner appealed, raising the single issue of the validity of the warrant; the Court of Appeals did not reach the merits of his claim respecting the warrant, however, holding only that he lacked standing to challenge the legality of the search and seizure. 446 F. 2d 515.

In concluding that petitioner lacked such standing, the Court of Appeals noted, *inter alia*, that he had "asserted

[3] No evidence relating to petitioner's standing was introduced at the hearing.

no possessory or proprietary claim to the searched premises" during the course of the trial. 446 F. 2d, at 516. Clearly, however, petitioner's failure to make any such assertion, either at the trial or at the pretrial suppression hearing, may well be explained by the related failure of the Government to make any challenge in the District Court to petitioner's standing to raise his Fourth Amendment claim. In any event, the record now before us is virtually barren of the facts necessary to determine whether petitioner had an interest in connection with the searched premises that gave rise to "a reasonable expectation [on his part] of freedom from governmental intrusion" upon those premises. *Mancusi* v. *DeForte*, 392 U. S. 364, 368 (1968).[4] If petitioner can establish facts showing such an interest, he will have demonstrated a basis for standing to attack the search; re-examination of the validity of the warrant in light of the Government's present position on that issue would then be

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[4] The Court in *Mancusi* relied upon *Jones* v. *United States*, 362 U. S. 257 (1960), as having done away with "the requirement that to establish standing one must show legal possession or ownership of the searched premises." 392 U. S., at 369. In *Jones*, the Court held that the petitioner then before it had standing and enunciated two rules as alternative grounds for its decision. First, the *Jones* Court ruled that the "possession on the basis of which [an accused] is to be . . . convicted suffices to give him standing under any fair and rational conception of the requirements of Rule 41 (e)," Fed. Rule Crim. Proc.; second, the Court ruled that "anyone legitimately on premises where a search occurs" has standing to challenge the legality of that search. 362 U. S., at 264, 267. The Government has urged that we take the opportunity, said to be presented by the instant case, to re-examine the first alternative holding of *Jones*. Even assuming we were disposed to do so, the Court of Appeals did not, in the opinion it filed in this case, deal with the question whether the nature of the charge against petitioner brought his case within the coverage of the first aspect of the *Jones* holding, and we decline to reach or consider issues not yet passed on by that court.

appropriate to resolve the question whether evidence of the seized whiskey was properly introduced at petitioner's trial.

Since there has not yet been any factual determination of whether petitioner had an interest in the searched premises that was protectible under the doctrine of *Mancusi* v. *DeForte*, we vacate the judgment of the Court of Appeals and remand with directions that the case be sent back to the District Court for further proceedings consistent with this opinion.

Vacated and remanded.

MR. JUSTICE DOUGLAS concurs in the result.

KOIS *v.* WISCONSIN

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

No. 71-5625. Decided June 26, 1972

Petitioner was convicted under an obscenity statute for publishing in his underground newspaper pictures of nudes and a sex poem. The State Supreme Court upheld the conviction as not violative of the Fourteenth Amendment. *Held:* In the context in which they appeared, the photographs were rationally related to a news article, in conjunction with which they appeared, and were entitled to Fourteenth Amendment protection. In view of the poem's content and placement with other poems inside the newspaper, its dominant theme cannot be said to appeal to prurient interest. *Roth* v. *United States*, 354 U. S. 476.

Certiorari granted; 51 Wis. 2d 668, 188 N. W. 2d 467, reversed.

PER CURIAM.

Petitioner was convicted in the state trial court of violating a Wisconsin statute prohibiting the dissemination of "lewd, obscene or indecent written matter, picture, sound recording, or film." Wis. Stat. § 944.21 (1)(a) (1969). He was sentenced to consecutive one-year terms in the Green Bay Reformatory and fined $1,000 on each of two counts. The Supreme Court of Wisconsin upheld his conviction against the contention that he had been deprived of freedom of the press in violation of the Fourteenth Amendment. 51 Wis. 2d 668, 188 N. W. 2d 467.

Petitioner was the publisher of an underground newspaper called Kaleidoscope. In an issue published in May 1968, that newspaper carried a story entitled "The One Hundred Thousand Dollar Photos" on an interior page. The story itself was an account of the arrest of one of Kaleidoscope's photographers on a charge of pos-

session of obscene material. Two relatively small pictures, showing a nude man and nude woman embracing in a sitting position, accompanied the article and were described in the article as "similar" to those seized from the photographer. The article said that the photographer, while waiting in the district attorney's office, had heard that bail might be set at $100,000. The article went on to say that bail had in fact been set originally at $100, then raised to $250, and that later the photographer had been released on his own recognizance. The article purported to detail police tactics that were described as an effort to "harass" Kaleidoscope and its staff.

Roth v. *United States*, 354 U. S. 476 (1957), held that obscenity was not protected under the First or Fourteenth Amendments. Material may be considered obscene when "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." 354 U. S., at 489. In enunciating this test, the Court in *Roth* quoted from *Thornhill* v. *Alabama*, 310 U. S. 88, 101–102:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for *information and education with respect to the significant issues of the times*. . . ." (Emphasis supplied.)

We do not think it can fairly be said, either considering the article as it appears or the record before the state

court, that the article was a mere vehicle for the publication of the pictures. A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication, but if these pictures were indeed similar to the one seized—and we do not understand the State to contend differently—they are relevant to the theme of the article. We find it unnecessary to consider whether the State could constitutionally prohibit the dissemination of the pictures by themselves, because in the context in which they appeared in the newspaper they were rationally related to an article that itself was clearly entitled to the protection of the Fourteenth Amendment. *Thornhill* v. *Alabama, supra.* The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The conviction on count one must therefore be reversed.

In its August 1968 issue, Kaleidoscope published a two-page spread consisting of 11 poems, one of which was entitled "Sex Poem." The second count of petitioner's conviction was for the dissemination of the newspaper containing this poem. The poem is an undisguisedly frank, play-by-play account of the author's recollection of sexual intercourse. But, as the *Roth* Court emphasized, "sex and obscenity are not synonymous. . . . The portrayal of sex, *e. g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." 354 U. S., at 487. A reviewing court must, of necessity, look at the context of the material, as well as its content.

In this case, considering the poem's content and its placement amid a selection of poems in the interior of a newspaper, we believe that it bears some of the earmarks of an attempt at serious art. While such earmarks are not inevitably a guarantee against a finding of obscenity, and while in this case many would conclude

that the author's reach exceeded his grasp, this element must be considered in assessing whether or not the "dominant" theme of the material appeals to prurient interest. While "contemporary community standards," *Roth* v. *United States*, 354 U. S., at 489, must leave room for some latitude of judgment, and while there is an undeniably subjective element in the test as a whole, the "dominance" of the theme is a question of constitutional fact. Giving due weight and respect to the conclusions of the trial court and to the Supreme Court of Wisconsin, we do not believe that it can be said that the dominant theme of this poem appeals to prurient interest. The judgment on the second count, therefore, must also be reversed.

Reversed.

MR. JUSTICE STEWART concurs in the judgment.

MR. JUSTICE DOUGLAS, concurring in the judgment.

I concur in the judgment because neither logic, history, nor the plain meaning of the English language will support the obscenity exception this Court has engrafted onto the First Amendment.

This case, moreover, is further testimony to the morass in which this Court has placed itself in the area of obscenity. Men are sent to prison under definitions which they cannot understand, and on which lower courts and members of this Court cannot agree. Here, the Court is forced to examine the thematic content of the two newspapers for the publication of which petitioner was prosecuted in order to hold that they are constitutionally protected. Highly subjective inquiries such as this do not lend themselves to a workable or predictable rule of law, nor should they be the basis of fines or imprisonment.

In this case, the vague umbrella of obscenity laws was used in an attempt to run a radical newspaper out of

business and to impose a two-year sentence and a $2,000 fine upon its publisher. If obscenity laws continue in this uneven and uncertain enforcement, then the vehicle has been found for the suppression of any unpopular tract. The guarantee of free expression will thus be diluted and in its stead public discourse will only embrace that which has the approval of five members of this Court.

The prospect is not imaginary now that the Bill of Rights, applicable to the States by reason of the Fourteenth Amendment, is coming to be a "watered down" version, meaning not what it says but only what a majority of this Court thinks fit and proper.

BEECHER *v.* ALABAMA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 71-6497. Decided June 26, 1972

After this Court reversed petitioner's 1964 murder conviction on the ground that written confessions used as evidence in his trial were involuntary as the products of gross coercion and thus violated due process, petitioner was reindicted, retried, and convicted after an oral confession had been admitted into evidence. That confession had been made to a hospital doctor one hour after petitioner's arrest while he was in extreme pain from a gunshot wound and under the influence of morphine. *Held:* Petitioner's oral confession was also invalid, having been the product of gross coercion and part of the same "stream of events" that necessitated invalidation of the written confessions.

Certiorari granted; 288 Ala. 1, 256 So. 2d 154, reversed.

PER CURIAM.

In 1964 the petitioner was tried and convicted in an Alabama state court for first-degree murder. He was sentenced to death. The conviction was based in large part on written confessions that he had signed five days after his arrest. The petitioner objected to the introduction at trial of these confessions. But the trial court and the Alabama Supreme Court held that the confessions were made voluntarily and were properly received into evidence.

In 1967 this Court summarily reversed that judgment of the Alabama Supreme Court. *Beecher* v. *Alabama,* 389 U. S. 35. We said:

> "The uncontradicted facts of record are these. Tennessee police officers saw the petitioner as he fled into an open field and fired a bullet into his right leg. He fell, and the local Chief of Police pressed a loaded gun to his face while another of-

ficer pointed a rifle against the side of his head. The Police Chief asked him whether he had raped and killed a white woman. When he said that he had not, the Chief called him a liar and said, 'If you don't tell the truth I am going to kill you.' The other officer then fired his rifle next to the petitioner's ear, and the petitioner immediately confessed. Later the same day he received an injection to ease the pain in his leg. He signed something the Chief of Police described as 'extradition papers' after the officers told him that 'it would be best . . . to sign the papers before the gang of people came there and killed' him. He was then taken by ambulance from Tennessee to Kilby Prison in Montgomery, Alabama. By June 22, the petitioner's right leg, which was later amputated, had become so swollen and his wound so painful that he required an injection of morphine every four hours. Less than an hour after one of these injections, two Alabama investigators visited him in the prison hospital. The medical assistant in charge told the petitioner to 'cooperate' and, in the petitioner's presence, he asked the investigators to inform him if the petitioner did not 'tell them what they wanted to know.' The medical assistant then left the petitioner alone with the State's investigators. In the course of a 90-minute 'conversation,' the investigators prepared two detailed statements similar to the confession the petitioner had given five days earlier at gunpoint in Tennessee. Still in a 'kind of slumber' from his last morphine injection, feverish, and in intense pain, the petitioner signed the written confessions thus prepared for him." *Id.*, at 36–37.

We were led to "the inescapable conclusion that the petitioner's confessions were involuntary." *Id.*, at 38.

For "[t]he petitioner, already wounded by the police, was ordered at gunpoint to speak his guilt or be killed. From that time until he was directed five days later to tell Alabama investigators 'what they wanted to know,' there was 'no break in the stream of events,' *Clewis* v. *Texas*, 386 U. S. 707, 710. For he was then still in pain, under the influence of drugs, and at the complete mercy of the prison hospital authorities." *Ibid.* Because the confessions "were the product of gross coercion," we held that their use at the petitioner's trial violated the Due Process Clause of the Fourteenth Amendment. *Ibid.*

Only three months after this Court's decision, the petitioner was reindicted and retried for the same crime. Again, a confession was introduced in evidence. Again, it was a confession made by the petitioner shortly after he had been shot and arrested and shortly after he had been given a large dose of morphine. Again, the petitioner was convicted and sentenced to death.

The confession used at the second trial was not exactly the same as the ones that had been used against the petitioner at his first trial. It was not one of the written confessions made by the petitioner in an Alabama hospital five days after his arrest. Instead, it was an oral confession that the petitioner had made in a Tennessee hospital only one hour after his arrest.

One hour after the arrest, in extreme pain from the gunshot that had blown most of the bone out of one leg, the petitioner was brought by police to a Tennessee hospital. There, a doctor gave him two large injections of morphine. The petitioner testified that the morphine "kinda made me feel like I wanted to love somebody; took the pain away; made me feel relaxed." From then on, the petitioner said, he could remember nothing. But the doctor testified at trial that he had asked the petitioner "why he did it [the crime]." Ac-

cording to the doctor, the petitioner then made an oral confession. Although police were in the area guarding the petitioner, the confession was made only to the doctor.

The Alabama Supreme Court held that this oral confession was made voluntarily and was admissible in evidence against the petitioner. *Beecher* v. *State*, 288 Ala. 1, 256 So. 2d 154. We do not agree. We held five years ago that the confession elicited from the petitioner at the scene of his arrest was plainly involuntary.* We also held that his written confessions five days later, while in custody and under the influence of morphine, were part of the "stream of events" beginning with the arrest and were infected with "gross coercion." 389 U. S., at 38. The oral confession, made only an hour after the arrest and upon which the State now relies, was surely a part of the same "stream of events."

We hold now—as we held before—that a "realistic appraisal of the circumstances of *this* case compels the conclusion that this petitioner's [confession was] the product of gross coercion. Under the Due Process Clause of the Fourteenth Amendment, no conviction tainted by a confession so obtained can stand." *Ibid.*

Accordingly, the motion for leave to proceed in *forma pauperis* and the petition for certiorari are granted. The judgment is

Reversed.

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*Although at the second trial the Chief of Police who arrested the petitioner denied having made an explicit threat to kill him if he did not confess at that time, the fact that the petitioner was surrounded by a very angry mob and that police were holding guns on him and even fired one shot by his head is enough to support our original conclusion as to the grossly coercive nature of the police questioning at the scene of the arrest.

FURMAN *v.* GEORGIA

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 69–5003. Argued January 17, 1972—Decided June 29, 1972*

Imposition and carrying out of death penalty in these cases *held* to constitute cruel and unusual punishment in violation of Eighth and Fourteenth Amendments.

No. 69–5003, 225 Ga. 253, 167 S. E. 2d 628; No. 69–5030, 225 Ga. 790, 171 S. E. 2d 501; No. 69–5031, 447 S. W. 2d 932, reversed and remanded.

Anthony G. Amsterdam argued the cause for petitioner in No. 69–5003. With him on the brief were *B. Clarence Mayfield, Michael Meltsner, Jack Greenberg, James M. Nabrit III, Jack Himmelstein,* and *Elizabeth B. DuBois. Mr. Greenberg* argued the cause for petitioner in No. 69–5030. With him on the brief were *Messrs. Meltsner, Amsterdam, Nabrit, Himmelstein,* and *Mrs. DuBois. Melvyn Carson Bruder* argued the cause and filed a brief for petitioner in No. 69–5031.

Dorothy T. Beasley, Assistant Attorney General of Georgia, argued the cause for respondent in Nos. 69–5003 and 69–5030. With her on the briefs were *Arthur K. Bolton,* Attorney General, *Harold N. Hill, Jr.,* Executive Assistant Attorney General, *Courtney Wilder Stanton,* Assistant Attorney General, and *Andrew J. Ryan, Jr. Charles Alan Wright* argued the cause for respondent in No. 69–5031. With him on the brief were *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Alfred Walker,* Executive Assistant Attorney General, and *Robert C. Flowers* and *Glenn R. Brown,* Assistant Attorneys General.

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*Together with No. 69–5030, *Jackson* v. *Georgia,* on certiorari to the same court, and No. 69–5031, *Branch* v. *Texas,* on certiorari to the Court of Criminal Appeals of Texas.

Theodore L. Sendak, Attorney General, and *David O. Givens,* Deputy Attorney General, filed a brief for the State of Indiana as *amicus curiae* urging affirmance in No. 69–5003. *Paul Raymond Stone* filed a brief for the West Virginia Council of Churches et al. as *amici curiae* urging reversal in Nos. 69–5003 and 69–5030. *John E. Havelock,* Attorney General, filed a brief for the State of Alaska as *amicus curiae* in Nos. 69–5003 and 69–5030. Briefs of *amici curiae* in all three cases were filed by *Gerald H. Gottlieb, Melvin L. Wulf,* and *Sanford Jay Rosen* for the American Civil Liberties Union; by *Leo Pfeffer* for the Synagogue Council of America et al.; by *Chauncey Eskridge, Mario G. Obledo, Leroy D. Clark, Nathaniel R. Jones,* and *Vernon Jordan* for the National Association for the Advancement of Colored People et al.; by *Michael V. DiSalle* for Edmund G. Brown et al.; and by *Hilbert P. Zarky* and *Marc I. Hayutin* for James V. Bennett et al.

PER CURIAM.

Petitioner in No. 69–5003 was convicted of murder in Georgia and was sentenced to death pursuant to Ga. Code Ann. § 26–1005 (Supp. 1971) (effective prior to July 1, 1969). 225 Ga. 253, 167 S. E. 2d 628 (1969). Petitioner in No. 69–5030 was convicted of rape in Georgia and was sentenced to death pursuant to Ga. Code Ann. § 26–1302 (Supp. 1971) (effective prior to July 1, 1969). 225 Ga. 790, 171 S. E. 2d 501 (1969). Petitioner in No. 69–5031 was convicted of rape in Texas and was sentenced to death pursuant to Tex. Penal Code, Art. 1189 (1961). 447 S. W. 2d 932 (Ct. Crim. App. 1969). Certiorari was granted limited to the following question: "Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?" 403 U. S. 952 (1971). The Court holds that the imposi-

tion and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings.

So ordered.

MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL have filed separate opinions in support of the judgments. THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST have filed separate dissenting opinions.

MR. JUSTICE DOUGLAS, concurring.

In these three cases the death penalty was imposed, one of them for murder, and two for rape. In each the determination of whether the penalty should be death or a lighter punishment was left by the State to the discretion of the judge or of the jury. In each of the three cases the trial was to a jury. They are here on petitions for certiorari which we granted limited to the question whether the imposition and execution of the death penalty constitute "cruel and unusual punishment" within the meaning of the Eighth Amendment as applied to the States by the Fourteenth.[1] I vote to vacate each judgment, believing that the exaction of the death penalty does violate the Eighth and Fourteenth Amendments.

[1] The opinion of the Supreme Court of Georgia affirming Furman's conviction of murder and sentence of death is reported in 225 Ga. 253, 167 S. E. 2d 628, and its opinion affirming Jackson's conviction of rape and sentence of death is reported in 225 Ga. 790, 171 S. E. 2d 501. The conviction of Branch of rape and the sentence of death were affirmed by the Court of Criminal Appeals of Texas and reported in 447 S. W. 2d 932.

That the requirements of due process ban cruel and unusual punishment is now settled. *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459, 463, and 473–474 (Burton, J., dissenting); *Robinson* v. *California,* 370 U. S. 660, 667. It is also settled that the proscription of cruel and unusual punishments forbids the judicial imposition of them as well as their imposition by the legislature. *Weems* v. *United States,* 217 U. S. 349, 378–382.

Congressman Bingham, in proposing the Fourteenth Amendment, maintained that "the privileges or immunities of citizens of the United States" as protected by the Fourteenth Amendment included protection against "cruel and unusual punishments:"

> "[M]any instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guarantied privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, 'cruel and unusual punishments' have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none." Cong. Globe, 39th Cong., 1st Sess., 2542.

Whether the privileges and immunities route is followed, or the due process route, the result is the same.

It has been assumed in our decisions that punishment by death is not cruel, unless the manner of execution can be said to be inhuman and barbarous. *In re Kemmler,* 136 U. S. 436, 447. It is also said in our opinions

that the proscription of cruel and unusual punishments "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems* v. *United States, supra,* at 378. A like statement was made in *Trop* v. *Dulles,* 356 U. S. 86, 101, that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

The generality of a law inflicting capital punishment is one thing. What may be said of the validity of a law on the books and what may be done with the law in its application do, or may, lead to quite different conclusions.

It would seem to be incontestable that the death penalty inflicted on one defendant is "unusual" if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.

There is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature: [2]

> "Following the Norman conquest of England in 1066, the old system of penalties, which ensured equality between crime and punishment, suddenly disappeared. By the time systematic judicial records were kept, its demise was almost complete. With the exception of certain grave crimes for which the punishment was death or outlawry, the arbitrary fine was replaced by a discretionary

[2] Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839, 845–846 (1969).

amercement. Although amercement's discretionary character allowed the circumstances of each case to be taken into account and the level of cash penalties to be decreased or increased accordingly, the amercement presented an opportunity for excessive or oppressive fines.

"The problem of excessive amercements became so prevalent that three chapters of the Magna Carta were devoted to their regulation. Maitland said of Chapter 14 that 'very likely there was no clause in the Magna Carta more grateful to the mass of the people.' Chapter 14 clearly stipulated as fundamental law a prohibition of excessiveness in punishments:

"'A free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity, saving his livelihood; and a merchant likewise, saving his merchandise; in the same way a villein shall be amerced saving his wainage; if they fall into our mercy. And none of the aforesaid amercements shall be imposed except by the testimony of reputable men of the neighborhood.'"

The English Bill of Rights, enacted December 16, 1689, stated that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[3] These were the words chosen for our Eighth Amendment. A like provision had been in Virginia's Constitution of 1776[4] and in the constitutions

[3] 1 W. & M., Sess. 2, c. 2; 8 English Historical Documents, 1660–1714, p. 122 (A. Browning ed. 1953).

[4] 7 F. Thorpe, Federal & State Constitutions 3813 (1909).

of seven other States.[5] The Northwest Ordinance, enacted under the Articles of Confederation, included a prohibition of cruel and unusual punishments.[6] But the debates of the First Congress on the Bill of Rights throw little light on its intended meaning. All that appears is the following: [7]

> "Mr. SMITH, of South Carolina, objected to the words 'nor cruel and unusual punishments;' the import of them being too indefinite.
>
> "Mr. LIVERMORE: The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind."

The words "cruel and unusual" certainly include pen-

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[5] Delaware, Maryland, New Hampshire, North Carolina, Massachusetts, Pennsylvania, and South Carolina. 1 Thorpe, *supra*, n. 4, at 569; 3 *id.*, at 1688, 1892; 4 *id.*, at 2457; 5 *id.*, at 2788, 3101; 6 *id.*, at 3264.

[6] Set out in 1 U. S. C. XXXIX–XLI.

[7] 1 Annals of Cong. 754 (1789).

alties that are barbaric. But the words, at least when read in light of the English proscription against selective and irregular use of penalties, suggest that it is "cruel and unusual" to apply the death penalty—or any other penalty—selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.[8] Judge Tuttle, indeed, made abundantly clear in *Novak* v. *Beto*, 453 F. 2d 661, 673–679 (CA5) (concurring in part and dissenting in part), that solitary confinement may at times be "cruel and unusual" punishment. Cf. *Ex parte Medley*, 134 U. S. 160; *Brooks* v. *Florida*, 389 U. S. 413.

The Court in *McGautha* v. *California*, 402 U. S. 183, 198, noted that in this country there was almost from the beginning a "rebellion against the common-law rule imposing a mandatory death sentence on all convicted

[8] "When in respect of any class of offenses the difficulty of obtaining convictions is at all general in England, we may hold it as an axiom, that the law requires amendment. Such conduct in juries is the silent protest of the people against its undue severity. This was strongly exemplified in the case of prosecutions for the forgery of bank-notes, when it was a capital felony. It was in vain that the charge was proved. Juries would not condemn men to the gallows for an offense of which the punishment was out of all proportion to the crime; and as they could not mitigate the sentence they brought in verdicts of Not Guilty. The consequence was, that the law was changed; and when secondary punishments were substituted for the penalty of death, a forger had no better chance of an acquittal than any other criminal. Thus it is that the power which juries possess of refusing to put the law in force has, in the words of Lord John Russell, 'been the cause of amending many bad laws which the judges would have administered with professional bigotry, and above all, it has this important and useful consequence, that laws totally repugnant to the feelings of the community for which they are made, can not long prevail in England.'" W. Forsyth, History of Trial by Jury 367–368 (2d ed. 1971).

murderers." The first attempted remedy was to restrict the death penalty to defined offenses such as "premeditated" murder.[9] *Ibid.* But juries "took the

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[9] This trend was not universally applauded. In the early 1800's, England had a law that made it possible to impose the death sentence for stealing five shillings or more. 3 W. & M., c. 9, § 1. When a bill for abolishing that penalty (finally enacted in 1827, 7 & 8 Geo. 4, c. 27) was before the House of Lords in 1813, Lord Ellenborough said:

"If your Lordships look to the particular measure now under consideration, can it, I ask, be seriously maintained, that the most exemplary punishment, and the best suited to prevent the commission of this crime, ought not to be a punishment which might in some cases be inflicted? How, but by the enactments of the law now sought to be repealed, are the cottages of industrious poverty protected? What other security has a poor peasant, when he and his wife leave their home for their daily labours, that on their return their few articles of furniture or of clothes which they possess besides those which they carry on their backs, will be safe? . . . [B]y the enacting of the punishment of death, and leaving it to the discretion of the Crown to inflict that punishment or not, as the circumstances of the case may require, I am satisfied, and I am much mistaken if your Lordships are not satisfied, that this object is attained with the least possible expenditure. That the law is, as it has been termed, a bloody law, I can by no means admit. Can there be a better test than by a consideration of the number of persons who have been executed for offences of the description contained in the present Bill? Your Lordships are told, what is extremely true, that this number is very small; and this very circumstance is urged as a reason for a repeal of the law; but, before your Lordships are induced to consent to such repeal, I beg to call to your consideration the number of innocent persons who might have been plundered of their property or destroyed by midnight murderers, if the law now sought to be repealed had not been in existence:—a law upon which all the retail trade of this commercial country depends; and which I for one will not consent to be put in jeopardy." Debate in House of Lords, Apr. 2, 1813, pp. 23–24 (Longman, Hurst, Rees, Orme, & Brown, Paternoster-Row, London 1816).

law into their own hands" and refused to convict on the capital offense. *Id.*, at 199.

> "In order to meet the problem of jury nullification, legislatures did not try, as before, to refine further the definition of capital homicides. Instead they adopted the method of forthrightly granting juries the discretion which they had been exercising in fact." *Ibid.*

The Court concluded: "In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." *Id.*, at 207.

The Court refused to find constitutional dimensions in the argument that those who exercise their discretion to send a person to death should be given standards by which that discretion should be exercised. *Id.*, at 207–208.

A recent witness at the Hearings before Subcommittee No. 3 of the House Committee on the Judiciary, 92d Cong., 2d Sess., Ernest van den Haag, testifying on H. R. 8414 et al.,[10] stated:

> "Any penalty, a fine, imprisonment or the death penalty could be unfairly or unjustly applied. The

[10] H. R. 3243, 92d Cong., 1st Sess., introduced by Cong. Celler, would abolish all executions by the United States or by any State.

H. R. 8414, 92d Cong., 1st Sess., introduced by Cong. Celler, would provide an interim stay of all executions by the United States or by any State and contains the following proposed finding:

"Congress hereby finds that there exists serious question—

"(a) whether the infliction of the death penalty amounts to cruel and unusual punishment in violation of the eighth and fourteenth amendents to the Constitution; and

"(b) whether the death penalty is inflicted discriminatorily upon

> vice in this case is not in the penalty but in the process by which it is inflicted. It is unfair to inflict unequal penalties on equally guilty parties, or on any innocent parties, *regardless of what the penalty is.*" *Id.*, at 116–117. (Emphasis supplied.)

But those who advance that argument overlook *McGautha, supra.*

We are now imprisoned in the *McGautha* holding. Indeed the seeds of the present cases are in *McGautha.* Juries (or judges, as the case may be) have practically untrammeled discretion to let an accused live or insist that he die.[11]

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members of racial minorities, in violation of the fourteenth amendment to the Constitution,

"and, in either case, whether Congress should exercise its authority under section 5 of the fourteenth amendment to prohibit the use of the death penalty."

There is the naive view that capital punishment as "meted out in our courts, is the antithesis of barbarism." See Henry Paolucci, New York Times, May 27, 1972, p. 29, col. 1. But the Leopolds and Loebs, the Harry Thaws, the Dr. Sheppards and the Dr. Finchs of our society are never executed, only those in the lower strata, only those who are members of an unpopular minority or the poor and despised.

[11] The tension between our decision today and *McGautha* highlights, in my view, the correctness of MR. JUSTICE BRENNAN's dissent in that case, which I joined. 402 U. S., at 248. I should think that if the Eighth and Fourteenth Amendments prohibit the imposition of the death penalty on petitioners because they are "among a capriciously selected random handful upon whom the sentence of death has in fact been imposed," opinion of MR. JUSTICE STEWART, *post,* at 309–310, or because "there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not," opinion of MR. JUSTICE WHITE, *post,* at 313, statements with which I am in complete agreement—then the Due Process Clause of the Fourteenth Amendment would render unconstitutional "capital sentencing procedures that are purposely

Mr. Justice Field, dissenting in *O'Neil* v. *Vermont*, 144 U. S. 323, 340, said, "The State may, indeed, make the drinking of one drop of liquor an offence to be punished by imprisonment, but it would be an unheard-of cruelty if it should count the drops in a single glass and make thereby a thousand offences, and thus extend the punishment for drinking the single glass of liquor to an imprisonment of almost indefinite duration." What the legislature may not do for all classes uniformly and systematically, a judge or jury may not do for a class that prejudice sets apart from the community.

There is increasing recognition of the fact that the basic theme of equal protection is implicit in "cruel and unusual" punishments. "A penalty . . . should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily." [12] The same authors add that "[t]he extreme rarity with which applicable death penalty provisions are put to use raises a strong inference of arbitrariness." [13] The President's Commission on Law Enforcement and Administration of Justice recently concluded: [14]

> "Finally there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the

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constructed to allow the maximum possible variation from one case to the next, and [that] provide no mechanism to prevent that consciously maximized variation from reflecting merely random or arbitrary choice." *McGautha* v. *California*, 402 U. S. 183, 248 (BRENNAN, J., dissenting).

[12] Goldberg & Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv. L. Rev. 1773, 1790.

[13] *Id.*, at 1792.

[14] The Challenge of Crime in a Free Society 143 (1967).

> poor, the Negro, and the members of unpopular groups."

A study of capital cases in Texas from 1924 to 1968 reached the following conclusions: [15]

> "Application of the death penalty is unequal: most of those executed were poor, young, and ignorant.
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> . . . . .

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[15] Koeninger, Capital Punishment in Texas, 1924–1968, 15 Crime & Delin. 132, 141 (1969).

In H. Bedau, The Death Penalty in America 474 (1967 rev. ed.), it is stated:

RACE OF THE OFFENDER BY FINAL DISPOSITION

Final	Negro		White		Total	
Disposition	N	%	N	%	N	%
Executed	130	88.4	210	79.8	340	82.9
Commuted	17	11.6	53	20.2	70	17.1
Total	147	100.0	263	100.0	410	100.0

$X^2=4.33$; P less than .05. (For discussion of statistical symbols, see Bedau, *supra*, at 469.)

"Although there may be a host of factors other than race involved in this frequency distribution, something more than chance has operated over the years to produce this racial difference. On the basis of this study it is not possible to indict the judicial and other public processes prior to the death row as responsible for the association between Negroes and higher frequency of executions; nor is it entirely correct to assume that from the time of their appearance on death row Negroes are discriminated against by the Pardon Board. Too many unknown or presently immeasurable factors prevent our making definitive statements about the relationship. Nevertheless, because the Negro/high-execution association is statistically present, some suspicion of racial discrimination can hardly be avoided. If such a relationship had not appeared, this kind of suspicion could have been allayed; the existence of the relationship, although not 'proving' differential bias by the Pardon Boards over the years since 1914, strongly suggests that such bias has existed."

The latter was a study in Pennsylvania of people on death row between 1914 and 1958, made by Wolfgang, Kelly, & Nolde and printed

"Seventy-five of the 460 cases involved co-defendants, who, under Texas law, were given separate trials. In several instances where a white and a Negro were co-defendants, the white was sentenced to life imprisonment or a term of years, and the Negro was given the death penalty.

"Another ethnic disparity is found in the type of sentence imposed for rape. The Negro convicted of rape is far more likely to get the death penalty than a term sentence, whereas whites and Latins are far more likely to get a term sentence than the death penalty."

Warden Lewis E. Lawes of Sing Sing said: [16]

"Not only does capital punishment fail in its justification, but no punishment could be invented with so many inherent defects. It is an unequal punishment in the way it is applied to the rich and to the poor. The defendant of wealth and position never goes to the electric chair or to the gallows. Juries do not intentionally favour the rich, the law is theoretically impartial, but the defendant with ample means is able to have his case presented with every favourable aspect, while the poor defendant often has a lawyer assigned by the court. Sometimes such assignment is considered part of political patronage; usually the lawyer assigned has had no experience whatever in a capital case."

Former Attorney General Ramsey Clark has said, "It is the poor, the sick, the ignorant, the powerless and the hated who are executed." [17] One searches our chron-

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in 53 J. Crim. L. C. & P. S. 301 (1962). And see Hartung, Trends in the Use of Capital Punishment, 284 Annals 8, 14–17 (1952).

[16] Life and Death in Sing Sing 155–160 (1928).

[17] Crime in America 335 (1970).

icles in vain for the execution of any member of the affluent strata of this society. The Leopolds and Loebs are given prison terms, not sentenced to death.

Jackson, a black, convicted of the rape of a white woman, was 21 years old. A court-appointed psychiatrist said that Jackson was of average education and average intelligence, that he was not an imbecile, or schizophrenic, or psychotic, that his traits were the product of environmental influences, and that he was competent to stand trial. Jackson had entered the house after the husband left for work. He held scissors against the neck of the wife, demanding money. She could find none and a struggle ensued for the scissors, a battle which she lost; and she was then raped, Jackson keeping the scissors pressed against her neck. While there did not appear to be any long-term traumatic impact on the victim, she was bruised and abrased in the struggle but was not hospitalized. Jackson was a convict who had escaped from a work gang in the area, a result of a three-year sentence for auto theft. He was at large for three days and during that time had committed several other offenses—burglary, auto theft, and assault and battery.

Furman, a black, killed a householder while seeking to enter the home at night. Furman shot the deceased through a closed door. He was 26 years old and had finished the sixth grade in school. Pending trial, he was committed to the Georgia Central State Hospital for a psychiatric examination on his plea of insanity tendered by court-appointed counsel. The superintendent reported that a unanimous staff diagnostic conference had concluded "that this patient should retain his present diagnosis of Mental Deficiency, Mild to Moderate, with Psychotic Episodes associated with Convulsive Disorder." The physicians agreed that "at present the patient is not psychotic, but he is not capable of cooperating with his counsel in the preparation of his

defense"; and the staff believed "that he is in need of further psychiatric hospitalization and treatment."

Later, the superintendent reported that the staff diagnosis was Mental Deficiency, Mild to Moderate, with Psychotic Episodes associated with Convulsive Disorder. He concluded, however, that Furman was "not psychotic at present, knows right from wrong and is able to cooperate with his counsel in preparing his defense."

Branch, a black, entered the rural home of a 65-year-old widow, a white, while she slept and raped her, holding his arm against her throat. Thereupon he demanded money and for 30 minutes or more the widow searched for money, finding little. As he left, Jackson said if the widow told anyone what happened, he would return and kill her. The record is barren of any medical or psychiatric evidence showing injury to her as a result of Branch's attack.

He had previously been convicted of felony theft and found to be a borderline mental deficient and well below the average IQ of Texas prison inmates. He had the equivalent of five and a half years of grade school education. He had a "dull intelligence" and was in the lowest fourth percentile of his class.

We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.

Irving Brant has given a detailed account of the Bloody Assizes, the reign of terror that occupied the

closing years of the rule of Charles II and the opening years of the regime of James II (the Lord Chief Justice was George Jeffreys):

> "Nobody knows how many hundreds of men, innocent or of unproved guilt, Jeffreys sent to their deaths in the pseudo trials that followed Monmouth's feeble and stupid attempt to seize the throne. When the ordeal ended, scores had been executed and 1,260 were awaiting the hangman in three counties. To be absent from home during the uprising was evidence of guilt. Mere death was considered much too mild for the villagers and farmers rounded up in these raids. The directions to a high sheriff were to provide an ax, a cleaver, 'a furnace or cauldron to boil their heads and quarters, and soil to boil therewith, half a bushel to each traitor, and tar to tar them with, and a sufficient number of spears and poles to fix their heads and quarters' along the highways. One could have crossed a good part of northern England by their guidance.
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> "The story of The Bloody Assizes, widely known to Americans, helped to place constitutional limitations on the crime of treason and to produce a bar against cruel and unusual punishments. But in the polemics that led to the various guarantees of freedom, it had no place compared with the tremendous thrust of the trial and execution of Sidney. The hundreds of judicial murders committed by Jeffreys and his fellow judges were totally inconceivable in a free American republic, but any American could imagine himself in Sidney's place—executed for putting on paper, in his closet, words that later on came to express the basic principles of republican government. Unless barred by fundamental law, the legal rulings that permitted this

result could easily be employed against any person whose political opinions challenged the party in power." The Bill of Rights 154–155 (1965).

Those who wrote the Eighth Amendment knew what price their forebears had paid for a system based, not on equal justice, but on discrimination. In those days the target was not the blacks or the poor, but the dissenters, those who opposed absolutism in government, who struggled for a parliamentary regime, and who opposed governments' recurring efforts to foist a particular religion on the people. *Id.*, at 155–163. But the tool of capital punishment was used with vengeance against the opposition and those unpopular with the regime. One cannot read this history without realizing that the desire for equality was reflected in the ban against "cruel and unusual punishments" contained in the Eighth Amendment.

In a Nation committed to equal protection of the laws there is no permissible "caste" aspect [18] of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position. In ancient Hindu law a Brahman was exempt from capital punishment,[19] and under that law, "[g]enerally, in the law books, punishment increased in severity as social status diminished." [20] We have, I fear, taken in practice the same position, partially as a result of making the death pen-

[18] See Johnson, The Negro and Crime, 217 Annals 93 (1941).

[19] See J. Spellman, Political Theory of Ancient India 112 (1964).

[20] C. Drekmeier, Kingship and Community in Early India 233 (1962).

alty discretionary and partially as a result of the ability of the rich to purchase the services of the most respected and most resourceful legal talent in the Nation.

The high service rendered by the "cruel and unusual" punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are even-handed, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.

A law that stated that anyone making more than $50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that blacks, those who never went beyond the fifth grade in school, those who made less than $3,000 a year, or those who were unpopular or unstable should be the only people executed. A law which in the overall view reaches that result in practice [21] has no more sanctity than a law which in terms provides the same.

Thus, these discretionary statutes are unconstitutional

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[21] Cf. B. Prettyman, Jr., Death and The Supreme Court 296–297 (1961).

"The disparity of representation in capital cases raises doubts about capital punishment itself, which has been abolished in only nine states. If a James Avery [345 U. S. 559] can be saved from electrocution because his attorney made timely objection to the selection of a jury by the use of yellow and white tickets, while an Aubry Williams [349 U. S. 375] can be sent to his death by a jury selected in precisely the same manner, we are imposing our most extreme penalty in an uneven fashion.

"The problem of proper representation is not a problem of money, as some have claimed, but of a lawyer's ability, and it is not true that only the rich have able lawyers. Both the rich and the poor usually are well represented—the poor because more often than not the best attorneys are appointed to defend them. It is the middle-class defendant, who can afford to hire an attorney but not a very good one, who is at a disadvantage. Certainly William Fikes [352 U. S. 191], despite the anomalous position in which he finds himself

in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on "cruel and unusual" punishments.

Any law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment. *Yick Wo* v. *Hopkins,* 118 U. S. 356. Such conceivably might be the fate of a mandatory death penalty, where equal or lesser sentences were imposed on the elite, a harsher one on the minorities or members of the lower castes. Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach.

I concur in the judgments of the Court.

MR. JUSTICE BRENNAN, concurring.

The question presented in these cases is whether death is today a punishment for crime that is "cruel and unusual" and consequently, by virtue of the Eighth and Fourteenth Amendments, beyond the power of the State to inflict.[1]

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today, received as effective and intelligent a defense from his court-appointed attorneys as he would have received from an attorney his family had scraped together enough money to hire.

"And it is not only a matter of ability. An attorney must be found who is prepared to spend precious hours—the basic commodity he has to sell—on a case that seldom fully compensates him and often brings him no fee at all. The public has no conception of the time and effort devoted by attorneys to indigent cases. And in a first-degree case, the added responsibility of having a man's life depend upon the outcome exacts a heavy toll."

[1] The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*" (Emphasis added.) The Cruel and Unusual Punishments Clause is fully applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Robinson* v. *Cali-*

Almost a century ago, this Court observed that "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted." *Wilkerson* v. *Utah*, 99 U. S. 130, 135–136 (1879). Less than 15 years ago, it was again noted that "[t]he exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court." *Trop* v. *Dulles*, 356 U. S. 86, 99 (1958). Those statements remain true today. The Cruel and Unusual Punishments Clause, like the other great clauses of the Constitution, is not susceptible of precise definition. Yet we know that the values and ideals it embodies are basic to our scheme of government. And we know also that the Clause imposes upon this Court the duty, when the issue is properly presented, to determine the constitutional validity of a challenged punishment, whatever that punishment may be. In these cases, "[t]hat issue confronts us, and the task of resolving it is inescapably ours." *Id.*, at 103.

I

We have very little evidence of the Framers' intent in including the Cruel and Unusual Punishments Clause among those restraints upon the new Government enumerated in the Bill of Rights. The absence of such a restraint from the body of the Constitution was alluded to, so far as we now know, in the debates of only two of the state ratifying conventions. In the Massachusetts convention, Mr. Holmes protested:

> "What gives an additional glare of horror to these gloomy circumstances is the consideration, that Congress have to ascertain, point out, and deter-

fornia, 370 U. S. 660 (1962); *Gideon* v. *Wainwright*, 372 U. S. 335, 342 (1963); *Malloy* v. *Hogan*, 378 U. S. 1, 6 n. 6 (1964); *Powell* v. *Texas*, 392 U. S. 514 (1968).

> mine, what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline." 2 J. Elliot's Debates 111 (2d ed. 1876).

Holmes' fear that Congress would have unlimited power to prescribe punishments for crimes was echoed by Patrick Henry at the Virginia convention:

> ". . . Congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence—petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives. What says our [Virginia] bill of rights?—'that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' Are you not, therefore, now calling on those gentlemen who are to compose Congress, to . . . define punishments without this control? Will they find sentiments there similar to this bill of rights? You let them loose; you do more—you depart from the genius of your country. . . .
>
> "In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your [Virginia] declaration of rights. What has distinguished our ancestors?—

> That they would not admit of tortures, or cruel and barbarous punishment." 3 *id.*, at 447.[2]

These two statements shed some light on what the Framers meant by "cruel and unusual punishments." Holmes referred to "the most cruel and unheard-of punishments," Henry to "tortures, or cruel and barbarous punishment." It does not follow, however, that the Framers were exclusively concerned with prohibiting torturous punishments. Holmes and Henry were objecting to the absence of a Bill of Rights, and they cited to support their objections the unrestrained legislative power to prescribe punishments for crimes. Certainly we may suppose that they invoked the specter of the most drastic punishments a legislature might devise.

In addition, it is quite clear that Holmes and Henry focused wholly upon the necessity to restrain the legislative power. Because they recognized "that Congress have to ascertain, point out, and determine, what kinds of punishments shall be inflicted on persons convicted of crimes," they insisted that Congress must be limited in its power to punish. Accordingly, they

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[2] Henry continued:

"But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone." 3 J. Elliot's Debates 447–448 (2d ed. 1876).

Although these remarks have been cited as evidence that the Framers considered only torturous punishments to be "cruel and unusual," it is obvious that Henry was referring to the use of torture for the purpose of eliciting confessions from suspected criminals. Indeed, in the ensuing colloquy, see n. 3, *infra*, George Mason responded that the use of torture was prohibited by the right against self-incrimination contained in the Virginia Bill of Rights.

called for a "constitutional check" that would ensure that "when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives." [3]

The only further evidence of the Framers' intent appears from the debates in the First Congress on the adoption of the Bill of Rights.[4] As the Court noted in *Weems* v. *United States,* 217 U. S. 349, 368 (1910),

[3] It is significant that the response to Henry's plea, by George Nicholas, was simply that a Bill of Rights would be ineffective as a means of restraining the legislative power to prescribe punishments:

"But the gentleman says that, by this Constitution, they have power to make laws to define crimes and prescribe punishments; and that, consequently, we are not free from torture. . . . If we had no security against torture but our [Virginia] declaration of rights, we might be tortured to-morrow; for it has been repeatedly infringed and disregarded." 3 J. Elliot's Debates, *supra,* at 451.

George Mason misinterpreted Nicholas' response to Henry:

"Mr. GEORGE MASON replied that the worthy gentleman was mistaken in his assertion that the [Virginia] bill of rights did not prohibit torture; for that one clause expressly provided that no man can give evidence against himself; and that the worthy gentleman must know that, in those countries where torture is used, evidence was extorted from the criminal himself. Another clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition." *Id.,* at 452.

Nicholas concluded the colloquy by making his point again:

"Mr. NICHOLAS acknowledged the [Virginia] bill of rights to contain that prohibition, and that the gentleman was right with respect to the practice of extorting confession from the criminal in those countries where torture is used; but still he saw no security arising from the bill of rights as separate from the Constitution, for that it had been frequently violated with impunity." *Ibid.*

There was thus no denial that the legislative power should be restrained; the dispute was whether a Bill of Rights would provide a realistic restraint. The Framers, obviously, believed it would.

[4] We have not been referred to any mention of the Cruel and Unusual Punishments Clause in the debates of the state legislatures on ratification of the Bill of Rights.

the Cruel and Unusual Punishments Clause "received very little debate." The extent of the discussion, by two opponents of the Clause in the House of Representatives, was this:

> "Mr. SMITH, of South Carolina, objected to the words 'nor cruel and unusual punishments;' the import of them being too indefinite.
>
> "Mr. LIVERMORE.—The [Eighth Amendment] seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. . . . No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.
>
> "The question was put on the [Eighth Amendment], and it was agreed to by a considerable majority." 1 Annals of Cong. 754 (1789).[5]

Livermore thus agreed with Holmes and Henry that the Cruel and Unusual Punishments Clause imposed a limitation upon the legislative power to prescribe pun-

[5] The elided portion of Livermore's remarks reads: "What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine." Since Livermore did not ask similar rhetorical questions about the Cruel and Unusual Punishments Clause, it is unclear whether he included the Clause in his objection that the Eighth Amendment "seems to have no meaning in it."

ishments. However, in contrast to Holmes and Henry, who were supporting the Clause, Livermore, opposing it, did not refer to punishments that were considered barbarous and torturous. Instead, he objected that the Clause might someday prevent the legislature from inflicting what were then quite common and, in his view, "necessary" punishments—death, whipping, and earcropping.[6] The only inference to be drawn from Livermore's statement is that the "considerable majority" was prepared to run that risk. No member of the House rose to reply that the Clause was intended merely to prohibit torture.

Several conclusions thus emerge from the history of the adoption of the Clause. We know that the Framers' concern was directed specifically at the exercise of legislative power. They included in the Bill of Rights a prohibition upon "cruel and unusual punishments" precisely because the legislature would otherwise have had the unfettered power to prescribe punishments for crimes. Yet we cannot now know exactly what the Framers thought "cruel and unusual punishments" were. Certainly they intended to ban torturous punishments, but the available evidence does not support the further conclusion that *only* torturous punishments were to be outlawed. As Livermore's comments demonstrate, the Framers were well aware that the reach of the Clause was not limited to the proscription of unspeakable atrocities. Nor did they intend simply to forbid punishments considered "cruel and unusual" at the time. The "import" of the Clause is, indeed, "indefinite," and for good reason. A constitutional provision "is enacted, it is true, from an experience of evils, but its general lan-

[6] Indeed, the first federal criminal statute, enacted by the First Congress, prescribed 39 lashes for larceny and for receiving stolen goods, and one hour in the pillory for perjury. Act of Apr. 30, 1790, §§ 16–18, 1 Stat. 116.

guage should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth." *Weems* v. *United States*, 217 U. S., at 373.

It was almost 80 years before this Court had occasion to refer to the Clause. See *Pervear* v. *The Commonwealth*, 5 Wall. 475, 479–480 (1867). These early cases, as the Court pointed out in *Weems* v. *United States*, *supra*, at 369, did not undertake to provide "an exhaustive definition" of "cruel and unusual punishments." Most of them proceeded primarily by "looking backwards for examples by which to fix the meaning of the clause," *id.*, at 377, concluding simply that a punishment would be "cruel and unusual" if it were similar to punishments considered "cruel and unusual" at the time the Bill of Rights was adopted.[7] In *Wilkerson* v. *Utah*, 99 U. S., at 136, for instance, the Court found it "safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden." The "punishments of torture," which the Court labeled "atrocities," were cases where the criminal "was embowelled alive, beheaded, and quartered," and cases "of public dissection . . . and burning alive." *Id.*, at 135. Similarly, in *In re Kemm-*

[7] Many of the state courts, "feeling constrained thereto by the incidences of history," *Weems* v. *United States*, 217 U. S. 349, 376 (1910), were apparently taking the same position. One court "expressed the opinion that the provision did not apply to punishment by 'fine or imprisonment or both, but such as that inflicted at the whipping post, in the pillory, burning at the stake, breaking on the wheel,' etc." *Ibid.* Another court "said that ordinarily the terms imply something inhuman and barbarous, torture and the like. . . . Other cases . . . selected certain tyrannical acts of the English monarchs as illustrating the meaning of the clause and the extent of its prohibition." *Id.*, at 368.

ler, 136 U. S. 436, 446 (1890), the Court declared that "if the punishment prescribed for an offence against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition." The Court then observed, commenting upon the passage just quoted from *Wilkerson* v. *Utah*, *supra*, and applying the "manifestly cruel and unusual" test, that "[p]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." 136 U. S., at 447.

Had this "historical" interpretation of the Cruel and Unusual Punishments Clause prevailed, the Clause would have been effectively read out of the Bill of Rights. As the Court noted in *Weems* v. *United States*, *supra*, at 371, this interpretation led Story to conclude "that the provision 'would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct.'" And Cooley in his book, Constitutional Limitations, said the Court, "apparently in a struggle between the effect to be given to ancient examples and the inconsequence of a dread of them in these enlightened times, . . . hesitate[d] to advance definite views." *Id.*, at 375. The result of a judicial application of this interpretation was not surprising. A state court, for example, upheld the constitutionality of the whipping post: "In comparison with the 'barbarities of quartering, hanging in chains, castration, etc.,' it was easily reduced to insignificance." *Id.*, at 377.

But this Court in *Weems* decisively repudiated the "historical" interpretation of the Clause. The Court, returning to the intention of the Framers, "rel[ied] on the conditions which existed when the Constitution was adopted." And the Framers knew "that government by the people instituted by the Constitution would not imitate the conduct of arbitrary monarchs. The abuse of power might, indeed, be apprehended, but not that it would be manifested in provisions or practices which would shock the sensibilities of men." *Id.*, at 375. The Clause, then, guards against "[t]he abuse of power"; contrary to the implications in *Wilkerson* v. *Utah, supra,* and *In re Kemmler, supra,* the prohibition of the Clause is not "confine[d] . . . to such penalties and punishment as were inflicted by the Stuarts." 217 U. S., at 372. Although opponents of the Bill of Rights "felt sure that the spirit of liberty could be trusted, and that its ideals would be represented, not debased, by legislation," *ibid.*, the Framers disagreed:

> "[Patrick] Henry and those who believed as he did would take no chances. Their predominant political impulse was distrust of power, and they insisted on constitutional limitations against its abuse. But surely they intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their [jealousy] of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they

> might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the [Stuarts',] or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked." *Id.*, at 372–373.

The Court in *Weems* thus recognized that this "restraint upon legislatures" possesses an "expansive and vital character" that is " 'essential . . . to the rule of law and the maintenance of individual freedom.' " *Id.*, at 376–377. Accordingly, the responsibility lies with the courts to make certain that the prohibition of the Clause is enforced.[8] Referring to cases in which "prominence [was] given to the power of the legislature to define crimes and their punishment," the Court said:

> "We concede the power in most of its exercises. We disclaim the right to assert a judgment

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[8] The Court had earlier emphasized this point in *In re Kemmler*, 136 U. S. 436 (1890), even while stating the narrow, "historical" interpretation of the Clause:

"This [English] Declaration of Rights had reference to the acts of the *executive* and *judicial* departments of the government of England; but the language in question as used in the constitution of the State of New York was intended particularly to operate upon the *legislature* of the State, to whose control the punishment of crime was almost wholly confided. So that, if the punishment prescribed for an offence against the laws of the State were manifestly cruel and unusual, . . . it would be the duty of the *courts* to adjudge such penalties to be within the constitutional prohibition. And we think this equally true of the [Clause], in its application to *Congress*." *Id.*, at 446–447 (emphasis added).

against that of the legislature of the expediency of the laws or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such case not our discretion but our legal duty, strictly defined and imperative in its direction, is invoked." *Id.*, at 378.[9]

In short, this Court finally adopted the Framers' view of the Clause as a "constitutional check" to ensure that "when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives." That, indeed, is the only view consonant with our constitutional form of government. If the judicial conclusion that a punishment is "cruel and unusual" "depend[ed] upon virtually unanimous condemnation of the penalty at issue," then, "[l]ike no other constitutional provision, [the Clause's] only function would be to legitimize advances already made by the other departments and opinions already the conventional wisdom." We know that the Framers did not envision "so narrow a role for this basic guaranty of human rights." Goldberg & Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv. L. Rev. 1773, 1782 (1970). The right to be free of cruel and unusual punishments, like the other guarantees of the Bill of Rights, "may not be submitted to vote; [it] depend[s] on the outcome of no elections." "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied

[9] Indeed, the Court in *Weems* refused even to comment upon some decisions from state courts because they were "based upon sentences of courts, not upon the constitutional validity of laws." 217 U. S., at 377.

by the courts." *Board of Education* v. *Barnette,* 319 U. S. 624, 638 (1943).

Judicial enforcement of the Clause, then, cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes. That is precisely the reason the Clause appears in the Bill of Rights. The difficulty arises, rather, in formulating the "legal principles to be applied by the courts" when a legislatively prescribed punishment is challenged as "cruel and unusual." In formulating those constitutional principles, we must avoid the insertion of "judicial conception[s] of . . . wisdom or propriety," *Weems* v. *United States,* 217 U. S., at 379, yet we must not, in the guise of "judicial restraint," abdicate our fundamental responsibility to enforce the Bill of Rights. Were we to do so, the "constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality." *Id.,* at 373. The Cruel and Unusual Punishments Clause would become, in short, "little more than good advice." *Trop* v. *Dulles,* 356 U. S., at 104.

II

Ours would indeed be a simple task were we required merely to measure a challenged punishment against those that history has long condemned. That narrow and unwarranted view of the Clause, however, was left behind with the 19th century. Our task today is more complex. We know "that the words of the [Clause] are not precise, and that their scope is not static." We know, therefore, that the Clause "must draw its meaning from the evolving standards of decency that mark the prog-

ress of a maturing society." *Id.*, at 100–101.[10] That knowledge, of course, is but the beginning of the inquiry.

In *Trop* v. *Dulles*, *supra*, at 99, it was said that "[t]he question is whether [a] penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the [Clause]." It was also said that a challenged punishment must be examined "in light of the basic prohibition against inhuman treatment" embodied in the Clause. *Id.*, at 100 n. 32. It was said, finally, that:

> "The basic concept underlying the [Clause] is nothing less than the dignity of man. While the State has the power to punish, the [Clause] stands to assure that this power be exercised within the limits of civilized standards." *Id.*, at 100.

At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is "cruel and unusual," therefore, if it does not comport with human dignity.

This formulation, of course, does not of itself yield principles for assessing the constitutional validity of particular punishments. Nevertheless, even though "[t]his Court has had little occasion to give precise content to the [Clause]," *ibid.*, there are principles recognized in our cases and inherent in the Clause sufficient to permit a judicial determination whether a challenged punishment comports with human dignity.

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[10] The Clause "may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems* v. *United States*, 217 U. S., at 378.

The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings. Pain, certainly, may be a factor in the judgment. The infliction of an extremely severe punishment will often entail physical suffering. See *Weems* v. *United States,* 217 U. S., at 366.[11] Yet the Framers also knew "that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation." *Id.,* at 372. Even though "[t]here may be involved no physical mistreatment, no primitive torture," *Trop* v. *Dulles, supra,* at 101, severe mental pain may be inherent in the infliction of a particular punishment. See *Weems* v. *United States, supra,* at 366.[12] That, indeed, was one of the conclusions underlying the holding of the plurality in *Trop* v. *Dulles* that the punishment of expatriation violates the Clause.[13] And the

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[11] "It may be that even the cruelty of pain is not omitted. He must bear a chain night and day. He is condemned to painful as well as hard labor. What painful labor may mean we have no exact measure. It must be something more than hard labor. It may be hard labor pressed to the point of pain."

[12] "His prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicil without giving notice to the 'authority immediately in charge of his surveillance,' and without permission in writing. He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude. Even that hope is taken from him and he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty."

[13] "This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banish-

physical and mental suffering inherent in the punishment of *cadena temporal*, see nn. 11–12, *supra*, was an obvious basis for the Court's decision in *Weems* v. *United States* that the punishment was "cruel and unusual." [14]

More than the presence of pain, however, is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings. The barbaric punishments condemned by history, "punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like," are, of course, "attended with acute pain and suffering." *O'Neil* v. *Vermont*, 144 U. S. 323, 339 (1892) (Field, J., dissenting). When we consider why they have been condemned, however, we realize that the pain involved is not the only reason. The true significance of these punishments is that they treat

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ment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies. It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious." *Trop* v. *Dulles*, 356 U. S. 86, 102 (1958). Cf. *id.*, at 110–111 (BRENNAN, J., concurring):

"[I]t can be supposed that the consequences of greatest weight, in terms of ultimate impact on the petitioner, are unknown and unknowable. Indeed, in truth, he may live out his life with but minor inconvenience. . . . Nevertheless it cannot be denied that the impact of expatriation—especially where statelessness is the upshot—may be severe. Expatriation, in this respect, constitutes an especially demoralizing sanction. The uncertainty, and the consequent psychological hurt, which must accompany one who becomes an outcast in his own land must be reckoned a substantial factor in the ultimate judgment."

[14] "It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the bill of rights, both on account of their degree and kind." *Weems* v. *United States*, 217 U. S., at 377.

members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.

The infliction of an extremely severe punishment, then, like the one before the Court in *Weems* v. *United States*, from which "[n]o circumstance of degradation [was] omitted," 217 U. S., at 366, may reflect the attitude that the person punished is not entitled to recognition as a fellow human being. That attitude may be apparent apart from the severity of the punishment itself. In *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 464 (1947), for example, the unsuccessful electrocution, although it caused "mental anguish and physical pain," was the result of "an unforeseeable accident." Had the failure been intentional, however, the punishment would have been, like torture, so degrading and indecent as to amount to a refusal to accord the criminal human status. Indeed, a punishment may be degrading to human dignity solely because it *is* a punishment. A State may not punish a person for being "mentally ill, or a leper, or . . . afflicted with a venereal disease," or for being addicted to narcotics. *Robinson* v. *California*, 370 U. S. 660, 666 (1962). To inflict punishment for having a disease is to treat the individual as a diseased thing rather than as a sick human being. That the punishment is not severe, "in the abstract," is irrelevant; "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.*, at 667. Finally, of course, a punishment may be degrading simply by reason of its enormity. A prime example is expatriation, a "punishment more primitive than torture," *Trop* v. *Dulles*, 356 U. S., at 101, for it necessarily involves a

denial by society of the individual's existence as a member of the human community.[15]

In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause—that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words "cruel and unusual punishments" imply condemnation of the arbitrary infliction of severe punishments. And, as we now know, the English history of the Clause[16] reveals a particular concern with the establishment of a safeguard against arbitrary punishments. See Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839, 857–860 (1969).[17]

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[15] "There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights." *Trop* v. *Dulles*, 356 U. S., at 101–102.

[16] "The phrase in our Constitution was taken directly from the English Declaration of Rights of [1689] . . . ." *Id.*, at 100.

[17] The specific incident giving rise to the provision was the perjury trial of Titus Oates in 1685. "None of the punishments inflicted upon Oates amounted to torture. . . . In the context of the Oates'

This principle has been recognized in our cases.[18] In *Wilkerson* v. *Utah*, 99 U. S., at 133—134, the Court reviewed various treatises on military law in order to demonstrate that under "the custom of war" shooting was a common method of inflicting the punishment of death. On that basis, the Court concluded:

> "Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to [treatises on military law] are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that

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case, 'cruel and unusual' seems to have meant a severe punishment unauthorized by statute and not within the jurisdiction of the court to impose." Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839, 859 (1969). Thus, "[t]he irregularity and anomaly of Oates' treatment was extreme." Goldberg & Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv. L. Rev. 1773, 1789 n. 74 (1970). Although the English provision was intended to restrain the judicial and executive power, see n. 8, *supra*, the principle is, of course, fully applicable under our Clause, which is primarily a restraint upon the legislative power.

[18] In a case from the Philippine Territory, the Court struck down a punishment that "ha[d] no fellow in American legislation." *Weems* v. *United States*, 217 U. S., at 377. After examining the punishments imposed, under both United States and Philippine law, for similar as well as more serious crimes, *id.*, at 380–381, the Court declared that the "contrast" "exhibit[ed] a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice," *id.*, at 381. And in *Trop* v. *Dulles*, *supra*, in which a law of Congress punishing wartime desertion by expatriation was held unconstitutional, it was emphasized that "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime." *Id.*, at 102. When a severe punishment is not inflicted elsewhere, or when more serious crimes are punished less severely, there is a strong inference that the State is exercising arbitrary, "unrestrained power."

> category, within the meaning of the [Clause]. Soldiers convicted of desertion or other capital military offenses are in the great majority of cases sentenced to be shot, and the ceremony for such occasions is given in great fulness by the writers upon the subject of courts-martial." *Id.*, at 134–135.

The Court thus upheld death by shooting, so far as appears, solely on the ground that it was a common method of execution.[19]

As *Wilkerson* v. *Utah* suggests, when a severe punishment is inflicted "in the great majority of cases" in which it is legally available, there is little likelihood that the State is inflicting it arbitrarily. If, however, the infliction of a severe punishment is "something different from that which is generally done" in such cases, *Trop* v. *Dulles*, 356 U. S., at 101 n. 32,[20] there is a sub-

[19] In *Weems* v. *United States*, *supra*, at 369–370, the Court summarized the holding of *Wilkerson* v. *Utah*, 99 U. S. 130 (1879), as follows:

"The court pointed out that death was an usual punishment for murder, that it prevailed in the Territory for many years, and was inflicted by shooting, also that that mode of execution was usual under military law. It was hence concluded that it was not forbidden by the Constitution of the United States as cruel or unusual."

[20] It was said in *Trop* v. *Dulles*, *supra*, at 100–101, n. 32, that "[o]n the few occasions this Court has had to consider the meaning of the [Clause], precise distinctions between cruelty and unusualness do not seem to have been drawn. . . . If the word 'unusual' is to have any meaning apart from the word 'cruel,' however, the meaning should be the ordinary one, signifying something different from that which is generally done." There are other statements in prior cases indicating that the word "unusual" has a distinct meaning:

"We perceive nothing . . . unusual in this [punishment]." *Pervear* v. *The Commonwealth*, 5 Wall. 475, 480 (1867). "[T]he judgment of mankind would be that the punishment was not only an unusual but a cruel one . . . ." *O'Neil* v. *Vermont*, 144 U. S. 323, 340 (1892) (Field, J., dissenting). "It is unusual in its character." *Weems* v. *United States*, *supra*, at 377. "And the punishment

stantial likelihood that the State, contrary to the requirements of regularity and fairness embodied in the Clause, is inflicting the punishment arbitrarily. This principle is especially important today. There is scant danger, given the political processes "in an enlightened democracy such as ours," *id.*, at 100, that extremely severe punishments will be widely applied. The more significant function of the Clause, therefore, is to protect against the danger of their arbitrary infliction.

A third principle inherent in the Clause is that a severe punishment must not be unacceptable to contemporary society. Rejection by society, of course, is a strong indication that a severe punishment does not comport with human dignity. In applying this principle, however, we must make certain that the judicial determination is as objective as possible.[21]

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inflicted . . . is certainly unusual." *United States ex rel. Milwaukee Social Democratic Pub. Co.* v. *Burleson*, 255 U. S. 407, 430 (1921) (Brandeis, J., dissenting). "The punishment inflicted is not only unusual in character; it is, so far as known, unprecedented in American legal history." *Id.*, at 435. "There is no precedent for it. What then is it, if it be not cruel, unusual and unlawful?" *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 479 (1947) (Burton, J., dissenting). "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual." *Robinson* v. *California*, 370 U. S., at 667.

It is fair to conclude from these statements that "[w]hether the word 'unusual' has any qualitative meaning different from 'cruel' is not clear." *Trop* v. *Dulles*, *supra*, at 100 n. 32. The question, in any event, is of minor significance; this Court has never attempted to explicate the meaning of the Clause simply by parsing its words.

[21] The danger of subjective judgment is acute if the question posed is whether a punishment "shocks the most fundamental instincts of civilized man," *Louisiana ex rel. Francis* v. *Resweber*, *supra*, at 473 (Burton, J., dissenting), or whether "any man of right feeling and heart can refrain from shuddering," *O'Neil* v. *Vermont*, *supra*, at 340 (Field, J., dissenting), or whether "a cry of horror would rise from every civilized and Christian community of the country," *ibid.* Mr. Justice Frankfurter's concurring opinion in

Thus, for example, *Weems* v. *United States,* 217 U. S., at 380, and *Trop* v. *Dulles,* 356 U. S., at 102–103, suggest that one factor that may be considered is the existence of the punishment in jurisdictions other than those before the Court. *Wilkerson* v. *Utah, supra,* suggests that another factor to be considered is the historic usage of the punishment.[22] *Trop* v. *Dulles, supra,* at 99, combined present acceptance with past usage by observing that "the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty." In *Robinson* v. *California,* 370 U. S., at 666, which involved the infliction of punishment for narcotics addiction, the Court went a step further, concluding simply that "in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment."

The question under this principle, then, is whether there are objective indicators from which a court can conclude that contemporary society considers a severe punishment unacceptable. Accordingly, the judicial

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Louisiana ex rel. Francis v. *Resweber, supra,* is instructive. He warned "against finding in personal disapproval a reflection of more or less prevailing condemnation" and against "enforcing . . . private view[s] rather than that consensus of society's opinion which, for purposes of due process, is the standard enjoined by the Constitution." *Id.,* at 471. His conclusions were as follows: "I cannot bring myself to believe that [the State's procedure] . . . offends a principle of justice 'rooted in the traditions and conscience of our people.'" *Id.,* at 470. ". . . I cannot say that it would be 'repugnant to the conscience of mankind.'" *Id.,* at 471. Yet nowhere in the opinion is there any explanation of how he arrived at those conclusions.

[22] Cf. *Louisiana ex rel. Francis* v. *Resweber, supra,* at 463: "The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence."

task is to review the history of a challenged punishment and to examine society's present practices with respect to its use. Legislative authorization, of course, does not establish acceptance. The acceptability of a severe punishment is measured, not by its availability, for it might become so offensive to society as never to be inflicted, but by its use.

The final principle inherent in the Clause is that a severe punishment must not be excessive. A punishment is excessive under this principle if it is unnecessary: The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, cf. *Robinson* v. *California, supra,* at 666; *id.,* at 677 (DOUGLAS, J., concurring); *Trop* v. *Dulles, supra,* at 114 (BRENNAN, J., concurring), the punishment inflicted is unnecessary and therefore excessive.

This principle first appeared in our cases in Mr. Justice Field's dissent in *O'Neil* v. *Vermont,* 144 U. S., at 337.[23] He there took the position that:

> "[The Clause] is directed, not only against punishments of the character mentioned [torturous punishments], but against all punishments which by

[23] It may, in fact, have appeared earlier. In *Pervear* v. *The Commonwealth,* 5 Wall., at 480, the Court stated:

"We perceive nothing excessive, or cruel, or unusual in this [punishment]. The object of the law was to protect the community against the manifold evils of intemperance. The mode adopted, of prohibiting under penalties the sale and keeping for sale of intoxicating liquors, without license, is the usual mode adopted in many, perhaps, all of the States. It is wholly within the discretion of State legislatures."

This discussion suggests that the Court viewed the punishment as reasonably related to the purposes for which it was inflicted.

> their excessive length or severity are greatly disproportioned to the offences charged. The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted." *Id.*, at 339–340.

Although the determination that a severe punishment is excessive may be grounded in a judgment that it is disproportionate to the crime,[24] the more significant basis is that the punishment serves no penal purpose more effectively than a less severe punishment. This view of the principle was explicitly recognized by the Court in *Weems* v. *United States, supra.* There the Court, reviewing a severe punishment inflicted for the falsification of an official record, found that "the highest punishment possible for a crime which may cause the loss of many thousand[s] of dollars, and to prevent which the duty of the State should be as eager as to prevent the perversion of truth in a public document, is not greater than that which may be imposed for falsifying a single item of a public account." *Id.*, at 381. Stating that "this contrast shows more than different exercises of legislative judgment," the Court concluded that the punishment was unnecessarily severe in view of the purposes for which it was imposed. *Ibid.*[25]

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[24] Mr. Justice Field apparently based his conclusion upon an intuitive sense that the punishment was disproportionate to the criminal's moral guilt, although he also observed that "the punishment was greatly beyond anything required by any humane law for the offences," *O'Neil* v. *Vermont*, 144 U. S., at 340. Cf. *Trop* v. *Dulles*, 356 U. S., at 99: "Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime."

[25] "The State thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal." *Weems* v. *United States*, 217 U. S., at 381.

See also *Trop* v. *Dulles*, 356 U. S., at 111–112 (BRENNAN, J., concurring).[26]

There are, then, four principles by which we may determine whether a particular punishment is "cruel and unusual." The primary principle, which I believe supplies the essential predicate for the application of the others, is that a punishment must not by its severity be degrading to human dignity. The paradigm violation of this principle would be the infliction of a torturous punishment of the type that the Clause has always prohibited. Yet "[i]t is unlikely that any State at this moment in history," *Robinson* v. *California*, 370 U. S., at 666, would pass a law providing for the infliction of such a punishment. Indeed, no such punishment has ever been before this Court. The same may be said of the other principles. It is unlikely that this Court will confront a severe punishment that is obviously inflicted in wholly arbitrary fashion; no State would engage in a reign of blind terror. Nor is it likely that this Court will be called upon to review a severe punishment that is clearly and totally rejected throughout society; no legislature would be able even to authorize the infliction of such a punishment. Nor, finally, is it likely that this Court will have to consider a severe punishment that is patently unnecessary; no State today would inflict a severe punishment knowing that there was no reason whatever for doing so. In short, we are unlikely to have occasion to determine that a punishment is fatally offensive under any one principle.

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[26] The principle that a severe punishment must not be excessive does not, of course, mean that a severe punishment is constitutional merely because it is necessary. A State could not now, for example, inflict a punishment condemned by history, for any such punishment, no matter how necessary, would be intolerably offensive to human dignity. The point is simply that the unnecessary infliction of suffering is also offensive to human dignity.

Since the Bill of Rights was adopted, this Court has adjudged only three punishments to be within the prohibition of the Clause. See *Weems* v. *United States*, 217 U. S. 349 (1910) (12 years in chains at hard and painful labor); *Trop* v. *Dulles*, 356 U. S. 86 (1958) (expatriation); *Robinson* v. *California*, 370 U. S. 660 (1962) (imprisonment for narcotics addiction). Each punishment, of course, was degrading to human dignity, but of none could it be said conclusively that it was fatally offensive under one or the other of the principles. Rather, these "cruel and unusual punishments" seriously implicated several of the principles, and it was the application of the principles in combination that supported the judgment. That, indeed, is not surprising. The function of these principles, after all, is simply to provide means by which a court can determine whether a challenged punishment comports with human dignity. They are, therefore, interrelated, and in most cases it will be their convergence that will justify the conclusion that a punishment is "cruel and unusual." The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.

III

The punishment challenged in these cases is death. Death, of course, is a "traditional" punishment, *Trop* v. *Dulles*, *supra*, at 100, one that "has been employed throughout our history," *id.*, at 99, and its constitu-

tional background is accordingly an appropriate subject of inquiry.

There is, first, a textual consideration raised by the Bill of Rights itself. The Fifth Amendment declares that if a particular crime is punishable by death, a person charged with that crime is entitled to certain procedural protections.[27] We can thus infer that the Framers recognized the existence of what was then a common punishment. We cannot, however, make the further inference that they intended to exempt this particular punishment from the express prohibition of the Cruel and Unusual Punishments Clause.[28] Nor is there any indication in the debates on the Clause that a special exception was to be made for death. If anything, the indication is to the contrary, for Livermore specifically mentioned death as a candidate for future proscription under the Clause. See *supra*, at 262. Finally, it does not advance analysis to insist that the Framers did not believe that adoption

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[27] The Fifth Amendment provides: "No person shall be held to answer for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor shall any person be subject for the same offence to be twice put in jeopardy of *life* or limb; . . . nor be deprived of *life*, liberty, or property, without due process of law . . . ." (Emphasis added.)

[28] No one, of course, now contends that the reference in the Fifth Amendment to "jeopardy of . . . limb" provides perpetual constitutional sanction for such corporal punishments as branding and earcropping, which were common punishments when the Bill of Rights was adopted. But cf. n. 29, *infra*. As the California Supreme Court pointed out with respect to the California Constitution:

"The Constitution expressly proscribes cruel or unusual punishments. It would be mere speculation and conjecture to ascribe to the framers an intent to exempt capital punishment from the compass of that provision solely because at a time when the death penalty was commonly accepted they provided elsewhere in the Constitution for special safeguards in its application." *People* v. *Anderson*, 6 Cal. 3d 628, 639, 493 P. 2d 880, 887 (1972).

of the Bill of Rights would immediately prevent the infliction of the punishment of death; neither did they believe that it would immediately prevent the infliction of other corporal punishments that, although common at the time, see n. 6, *supra*, are now acknowledged to be impermissible.[29]

There is also the consideration that this Court has decided three cases involving constitutional challenges to particular methods of inflicting this punishment. In *Wilkerson* v. *Utah*, 99 U. S. 130 (1879), and *In re Kemmler*, 136 U. S. 436 (1890), the Court, expressing in both cases the since-rejected "historical" view of the Clause, see *supra*, at 264–265, approved death by shooting and death by electrocution. In *Wilkerson*, the Court concluded that shooting was a common method of execution, see *supra*, at 275–276; [30] in *Kemmler*, the Court held that the Clause did not apply to the States, 136 U. S., at 447–449.[31]

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[29] Cf. *McGautha* v. *California*, 402 U. S. 183, 226 (1971) (separate opinion of Black, J.):

"The [Clause] forbids 'cruel and unusual punishments.' In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the [Clause] was adopted. It is inconceivable to me that the framers intended to end capital punishment by the [Clause]."

Under this view, of course, any punishment that was in common use in 1791 is forever exempt from the Clause.

[30] The Court expressly noted that the constitutionality of the punishment itself was not challenged. *Wilkerson* v. *Utah*, 99 U. S., at 136–137. Indeed, it may be that the only contention made was that, in the absence of statutory sanction, the sentencing "court possessed no authority to prescribe the mode of execution." *Id.*, at 137.

[31] Cf. *McElvaine* v. *Brush*, 142 U. S. 155, 158–159 (1891):

"We held in the case of *Kemmler* . . . that as the legislature of the State of New York had determined that [electrocution] did not inflict cruel and unusual punishment, and its courts had sustained that

In *Louisiana ex rel. Francis* v. *Resweber, supra,* the Court approved a second attempt at electrocution after the first had failed. It was said that "[t]he Fourteenth [Amendment] would prohibit by its due process clause execution by a state in a cruel manner," 329 U. S., at 463, but that the abortive attempt did not make the "subsequent execution any more cruel in the constitutional sense than any other execution," *id.,* at 464.[32] These three decisions thus reveal that the Court, while ruling upon various methods of inflicting death, has assumed in the past that death was a constitutionally permissible punishment.[33] Past assumptions, however, are not sufficient to limit the scope of our examination of this punishment today. The constitutionality of death itself under the Cruel and Unusual Punishments Clause is before this Court for the first time; we cannot avoid the question by recalling past cases that never directly considered it.

The question, then, is whether the deliberate infliction of death is today consistent with the command of the Clause that the State may not inflict punishments that do not comport with human dignity. I will analyze the punishment of death in terms of the principles

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determination, we were unable to perceive that the State had thereby abridged the privileges or immunities of petitioner or deprived him of due process of law."

[32] It was also asserted that the Constitution prohibits "cruelty inherent in the method of punishment," but does not prohibit "the necessary suffering involved in any method employed to extinguish life humanely." 329 U. S., at 464. No authority was cited for this assertion, and, in any event, the distinction drawn appears to be meaningless.

[33] In a nondeath case, *Trop* v. *Dulles,* it was said that "*in a day* when it is still *widely accepted,* [death] cannot be said to violate the constitutional concept of cruelty." 356 U. S., at 99 (emphasis added). This statement, of course, left open the future constitutionality of the punishment.

set out above and the cumulative test to which they lead: It is a denial of human dignity for the State arbitrarily to subject a person to an unusually severe punishment that society has indicated it does not regard as acceptable, and that cannot be shown to serve any penal purpose more effectively than a significantly less drastic punishment. Under these principles and this test, death is today a "cruel and unusual" punishment.

Death is a unique punishment in the United States. In a society that so strongly affirms the sanctity of life, not surprisingly the common view is that death is the ultimate sanction. This natural human feeling appears all about us. There has been no national debate about punishment, in general or by imprisonment, comparable to the debate about the punishment of death. No other punishment has been so continuously restricted, see *infra,* at 296–298, nor has any State yet abolished prisons, as some have abolished this punishment. And those States that still inflict death reserve it for the most heinous crimes. Juries, of course, have always treated death cases differently, as have governors exercising their commutation powers. Criminal defendants are of the same view. "As all practicing lawyers know, who have defended persons charged with capital offenses, often the only goal possible is to avoid the death penalty." *Griffin* v. *Illinois,* 351 U. S. 12, 28 (1956) (Burton and Minton, JJ., dissenting). Some legislatures have required particular procedures, such as two-stage trials and automatic appeals, applicable only in death cases. "It is the universal experience in the administration of criminal justice that those charged with capital offenses are granted special considerations." *Ibid.* See *Williams* v. *Florida,* 399 U. S. 78, 103 (1970) (all States require juries of 12 in death cases). This Court, too, almost

always treats death cases as a class apart.[34] And the unfortunate effect of this punishment upon the functioning of the judicial process is well known; no other punishment has a similar effect.

The only explanation for the uniqueness of death is its extreme severity. Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering. Although our information is not conclusive, it appears that there is no method available that guarantees an immediate and painless death.[35] Since the discon-

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[34] "That life is at stake is of course another important factor in creating the extraordinary situation. The difference between capital and non-capital offenses is the basis of differentiation in law in diverse ways in which the distinction becomes relevant." *Williams* v. *Georgia,* 349 U. S. 375, 391 (1955) (Frankfurter, J.). "When the penalty is death, we, like state court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance." *Stein* v. *New York,* 346 U. S. 156, 196 (1953) (Jackson, J.). "In death cases doubts such as those presented here should be resolved in favor of the accused." *Andres* v. *United States,* 333 U. S. 740, 752 (1948) (Reed, J.). Mr. Justice Harlan expressed the point strongly: "I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel, . . . nor is it negligible, being literally that between life and death." *Reid* v. *Covert,* 354 U. S. 1, 77 (1957) (concurring in result). And, of course, for many years this Court distinguished death cases from all others for purposes of the constitutional right to counsel. See *Powell* v. *Alabama,* 287 U. S. 45 (1932); *Betts* v. *Brady,* 316 U. S. 455 (1942); *Bute* v. *Illinois,* 333 U. S. 640 (1948).

[35] See Report of Royal Commission on Capital Punishment 1949–1953, ¶¶ 700–789, pp. 246–273 (1953); Hearings on S. 1760 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 2d Sess., 19–21 (1968) (testimony of Clinton Duffy); H. Barnes & N. Teeters, New Horizons

tinuance of flogging as a constitutionally permissible punishment, *Jackson* v. *Bishop*, 404 F. 2d 571 (CA8 1968), death remains as the only punishment that may involve the conscious infliction of physical pain. In addition, we know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death. Cf. *Ex parte Medley*, 134 U. S. 160, 172 (1890). As the California Supreme Court pointed out, "the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture." *People* v. *Anderson*, 6 Cal. 3d 628, 649, 493 P. 2d 880, 894 (1972).[36] Indeed, as Mr. Justice Frankfurter noted, "the onset of insanity while awaiting

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in Criminology 306–309 (3d ed. 1959); C. Chessman, Trial by Ordeal 195–202 (1955); M. DiSalle, The Power of Life and Death 84–85 (1965); C. Duffy & A. Hirschberg, 88 Men and 2 Women 13–14 (1962); B. Eshelman, Death Row Chaplain 26–29, 101–104, 159–164 (1962); R. Hammer, Between Life and Death 208–212 (1969); K. Lamott, Chronicles of San Quentin 228–231 (1961); L. Lawes, Life and Death in Sing Sing 170–171 (1928); Rubin, The Supreme Court, Cruel and Unusual Punishment, and the Death Penalty, 15 Crime & Delin. 121, 128–129 (1969); Comment, The Death Penalty Cases, 56 Calif. L. Rev. 1268, 1338–1341 (1968); Brief *amici curiae* filed by James V. Bennett, Clinton T. Duffy, Robert G. Sarver, Harry C. Tinsley, and Lawrence E. Wilson 12–14.

[36] See Barnes & Teeters, *supra*, at 309–311 (3d ed. 1959); Camus, Reflections on the Guillotine, in A. Camus, Resistance, Rebellion, and Death 131, 151–156 (1960); C. Duffy & A. Hirschberg, *supra*, at 68–70, 254 (1962); Hammer, *supra*, at 222–235, 244–250, 269–272 (1969); S. Rubin, The Law of Criminal Correction 340 (1963); Bluestone & McGahee, Reaction to Extreme Stress: Impending Death by Execution, 119 Amer. J. Psychiatry 393 (1962); Gottlieb, Capital Punishment, 15 Crime & Delin. 1, 8–10 (1969); West, Medicine and Capital Punishment, in Hearings on S. 1760 before the Subcommittee on Criminal Laws and Procedures of the Senate Com-

execution of a death sentence is not a rare phenomenon." *Solesbee* v. *Balkcom*, 339 U. S. 9, 14 (1950) (dissenting opinion). The "fate of ever-increasing fear and distress" to which the expatriate is subjected, *Trop* v. *Dulles*, 356 U. S., at 102, can only exist to a greater degree for a person confined in prison awaiting death.[37]

The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself. Expatriation, for example, is a punishment that "destroys for the individual the political existence that was centuries in the development," that "strips the citizen of his status in the national and international political community," and that puts "[h]is very existence" in jeopardy. Expatriation thus inherently entails "the total destruction of the individual's status in organized society." *Id.*, at 101. "In short, the expatriate has lost the right to have rights." *Id.*, at 102. Yet, demonstrably, expatriation is not "a fate worse than death." *Id.*, at 125 (Frankfurter, J., dissenting).[38] Although death, like expatriation, destroys the

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mittee on the Judiciary, 90th Cong., 2d Sess., 124 (1968); Ziferstein, Crime and Punishment, The Center Magazine 84 (Jan. 1968); Comment, The Death Penalty Cases, 56 Calif. L. Rev. 1268, 1342 (1968); Note, Mental Suffering under Sentence of Death: A Cruel and Unusual Punishment, 57 Iowa L. Rev. 814 (1972).

[37] The State, of course, does not purposely impose the lengthy waiting period in order to inflict further suffering. The impact upon the individual is not the less severe on that account. It is no answer to assert that long delays exist only because condemned criminals avail themselves of their full panoply of legal rights. The right not to be subjected to inhuman treatment cannot, of course, be played off against the right to pursue due process of law, but, apart from that, the plain truth is that it is society that demands, even against the wishes of the criminal, that all legal avenues be explored before the execution is finally carried out.

[38] It was recognized in *Trop* itself that expatriation is a "punishment short of death." 356 U. S., at 99. Death, however, was distinguished on the ground that it was "still widely accepted." *Ibid.*

individual's "political existence" and his "status in organized society," it does more, for, unlike expatriation, death also destroys "[h]is very existence." There is, too, at least the possibility that the expatriate will in the future regain "the right to have rights." Death forecloses even that possibility.

Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident. An individual in prison does not lose "the right to have rights." A prisoner retains, for example, the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a "person" for purposes of due process of law and the equal protection of the laws. A prisoner remains a member of the human family. Moreover, he retains the right of access to the courts. His punishment is not irrevocable. Apart from the common charge, grounded upon the recognition of human fallibility, that the punishment of death must inevitably be inflicted upon innocent men, we know that death has been the lot of men whose convictions were unconstitutionally secured in view of later, retroactively applied, holdings of this Court. The punishment itself may have been unconstitutionally inflicted, see *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), yet the finality of death precludes relief. An executed person has indeed "lost the right to have rights." As one 19th century proponent of punishing criminals by death declared, "When a man is hung, there is an end of our relations with him. His execution is a way of saying, 'You are not fit for this world, take your chance elsewhere.' " [39]

[39] Stephen, Capital Punishments, 69 Fraser's Magazine 753, 763 (1864).

In comparison to all other punishments today, then, the deliberate extinguishment of human life by the State is uniquely degrading to human dignity. I would not hesitate to hold, on that ground alone, that death is today a "cruel and unusual" punishment, were it not that death is a punishment of longstanding usage and acceptance in this country. I therefore turn to the second principle—that the State may not arbitrarily inflict an unusually severe punishment.

The outstanding characteristic of our present practice of punishing criminals by death is the infrequency with which we resort to it. The evidence is conclusive that death is not the ordinary punishment for any crime.

There has been a steady decline in the infliction of this punishment in every decade since the 1930's, the earliest period for which accurate statistics are available. In the 1930's, executions averaged 167 per year; in the 1940's, the average was 128; in the 1950's, it was 72; and in the years 1960–1962, it was 48. There have been a total of 46 executions since then, 36 of them in 1963–1964.[40] Yet our population and the number of capital crimes committed have increased greatly over the past four decades. The contemporary rarity of the infliction of this punishment is thus the end result of a long-continued decline. That rarity is plainly revealed by an examination of the years 1961–1970, the last 10-year period for which statistics are available. During that time, an average of 106 death sentences

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[40] From 1930 to 1939: 155, 153, 140, 160, 168, 199, 195, 147, 190, 160. From 1940 to 1949: 124, 123, 147, 131, 120, 117, 131, 153, 119, 119. From 1950 to 1959: 82, 105, 83, 62, 81, 76, 65, 65, 49, 49. From 1960 to 1967: 56, 42, 47, 21, 15, 7, 1, 2. Department of Justice, National Prisoner Statistics No. 46, Capital Punishment 1930–1970, p. 8 (Aug. 1971). The last execution in the United States took place on June 2, 1967. *Id.*, at 4.

was imposed each year.[41] Not nearly that number, however, could be carried out, for many were precluded by commutations to life or a term of years,[42] transfers to mental institutions because of insanity,[43] resentences to life or a term of years, grants of new trials and orders for resentencing, dismissals of indictments and reversals of convictions, and deaths by suicide and natural causes.[44] On January 1, 1961, the death row population was 219; on December 31, 1970, it was 608; during that span, there were 135 executions.[45] Consequently, had the 389 additions to death row also been executed, the annual average would have been 52.[46] In short, the country

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[41] 1961—140; 1962—103; 1963—93; 1964—106; 1965—86; 1966—118; 1967—85; 1968—102; 1969—97; 1970—127. *Id.*, at 9.

[42] Commutations averaged about 18 per year. 1961—17; 1962—27; 1963—16; 1964—9; 1965—19; 1966—17; 1967—13; 1968—16; 1969—20; 1970—29. *Ibid.*

[43] Transfers to mental institutions averaged about three per year. 1961—3; 1962—4; 1963—1; 1964—3; 1965—4; 1966—3; 1967—3; 1968—2; 1969—1; 1970—5. *Ibid.*

[44] These four methods of disposition averaged about 44 per year. 1961—31, 1962—30; 1963—32; 1964—58; 1965—39; 1966—33; 1967—53; 1968—59; 1969—64; 1970—42. *Ibid.* Specific figures are available starting with 1967. Resentences: 1967—7; 1968—18; 1969—12; 1970—14. Grants of new trials and orders for resentencing: 1967—31; 1968—21; 1969—13; 1970—9. Dismissals of indictments and reversals of convictions: 1967—12; 1968—19; 1969—33; 1970—17. Deaths by suicide and natural causes: 1967—2; 1968—1; 1969—5; 1970—2. National Prisoner Statistics No. 42, Executions 1930–1967, p. 13 (June 1968); National Prisoner Statistics No. 45, Capital Punishment 1930–1968, p. 12 (Aug. 1969); National Prisoner Statistics, *supra*, n. 40, at 14–15.

[45] *Id.*, at 9.

[46] During that 10-year period, 1,177 prisoners entered death row, including 120 who were returned following new trials or treatment at mental institutions. There were 653 dispositions other than by

might, at most, have executed one criminal each week. In fact, of course, far fewer were executed. Even before the moratorium on executions began in 1967, executions totaled only 42 in 1961 and 47 in 1962, an average of less than one per week; the number dwindled to 21 in 1963, to 15 in 1964, and to seven in 1965; in 1966, there was one execution, and in 1967, there were two.[47]

When a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied. To dispel it would indeed require a clear showing of nonarbitrary infliction.

Although there are no exact figures available, we know that thousands of murders and rapes are committed annually in States where death is an authorized punishment for those crimes. However the rate of infliction is characterized—as "freakishly" or "spectacularly" rare, or simply as rare—it would take the purest sophistry to deny that death is inflicted in only a minute fraction of these cases. How much rarer, after all, could the infliction of death be?

When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system. The States claim, however, that this rarity is evidence not of arbitrariness, but of informed selectivity: Death is inflicted, they say, only in "extreme" cases.

Informed selectivity, of course, is a value not to be denigrated. Yet presumably the States could make precisely the same claim if there were 10 executions per

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execution, leaving 524 prisoners who might have been executed, of whom 135 actually were. *Ibid.*

[47] *Id.*, at 8.

year, or five, or even if there were but one. That there may be as many as 50 per year does not strengthen the claim. When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment. No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison. Crimes and criminals simply do not admit of a distinction that can be drawn so finely as to explain, on that ground, the execution of such a tiny sample of those eligible. Certainly the laws that provide for this punishment do not attempt to draw that distinction; all cases to which the laws apply are necessarily "extreme." Nor is the distinction credible in fact. If, for example, petitioner Furman or his crime illustrates the "extreme," then nearly all murderers and their murders are also "extreme." [48] Furthermore, our procedures in death cases,

[48] The victim surprised Furman in the act of burglarizing the victim's home in the middle of the night. While escaping, Furman killed the victim with one pistol shot fired through the closed kitchen door from the outside. At the trial, Furman gave his version of the killing:

"They got me charged with murder and I admit, I admit going to these folks' home and they did caught me in there and I was coming back out, backing up and there was a wire down there on the floor. I was coming out backwards and fell back and I didn't intend to kill nobody. I didn't know they was behind the door. The gun went off and I didn't know nothing about no murder until they arrested me, and when the gun went off I was down on the floor and I got up and ran. That's all to it." App. 54–55.

The Georgia Supreme Court accepted that version:

"The admission in open court by the accused . . . that during the period in which he was involved in the commission of a criminal act at the home of the deceased, he accidentally tripped over a wire in leaving the premises causing the gun to go off, together with other facts and circumstances surrounding the death of the deceased by violent means, was sufficient to support the verdict of guilty of

rather than resulting in the selection of "extreme" cases for this punishment, actually sanction an arbitrary selection. For this Court has held that juries may, as they do, make the decision whether to impose a death sentence wholly unguided by standards governing that decision. *McGautha* v. *California,* 402 U. S. 183, 196–208 (1971). In other words, our procedures are not constructed to guard against the totally capricious selection of criminals for the punishment of death.

Although it is difficult to imagine what further facts would be necessary in order to prove that death is, as my Brother STEWART puts it, "wantonly and . . . freakishly" inflicted, I need not conclude that arbitrary infliction is patently obvious. I am not considering this punishment by the isolated light of one principle. The probability of arbitrariness is sufficiently substantial that it can be relied upon, in combination with the other principles, in reaching a judgment on the constitutionality of this punishment.

When there is a strong probability that an unusually severe and degrading punishment is being inflicted arbitrarily, we may well expect that society will disapprove of its infliction. I turn, therefore, to the third principle. An examination of the history and present operation of the American practice of punishing criminals by death reveals that this punishment has been almost totally rejected by contemporary society.

I cannot add to my Brother MARSHALL's comprehensive treatment of the English and American history of

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murder . . . ." *Furman* v. *State,* 225 Ga. 253, 254, 167 S. E. 2d 628, 629 (1969).

About Furman himself, the jury knew only that he was black and that, according to his statement at trial, he was 26 years old and worked at "Superior Upholstery." App. 54. It took the jury one hour and 35 minutes to return a verdict of guilt and a sentence of death. *Id.,* at 64–65.

this punishment. I emphasize, however, one significant conclusion that emerges from that history. From the beginning of our Nation, the punishment of death has stirred acute public controversy. Although pragmatic arguments for and against the punishment have been frequently advanced, this longstanding and heated controversy cannot be explained solely as the result of differences over the practical wisdom of a particular government policy. At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death. In the United States, as in other nations of the western world, "the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries." [49] It is this essentially moral conflict that forms the backdrop for the past changes in and the present operation of our system of imposing death as a punishment for crime.

Our practice of punishing criminals by death has changed greatly over the years. One significant change has been in our methods of inflicting death. Although this country never embraced the more violent and repulsive methods employed in England, we did for a long time rely almost exclusively upon the gallows and the firing squad. Since the development of the supposedly

[49] T. Sellin, The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute 15 (1959).

more humane methods of electrocution late in the 19th century and lethal gas in the 20th, however, hanging and shooting have virtually ceased.[50] Our concern for decency and human dignity, moreover, has compelled changes in the circumstances surrounding the execution itself. No longer does our society countenance the spectacle of public executions, once thought desirable as a deterrent to criminal behavior by others. Today we reject public executions as debasing and brutalizing to us all.

Also significant is the drastic decrease in the crimes for which the punishment of death is actually inflicted. While esoteric capital crimes remain on the books, since 1930 murder and rape have accounted for nearly 99% of the total executions, and murder alone for about 87%.[51] In addition, the crime of capital murder has itself been limited. As the Court noted in *McGautha* v. *California,* 402 U. S., at 198, there was in this country a "rebellion against the common-law rule imposing a mandatory death sentence on all convicted murderers." Initially, that rebellion resulted in legislative definitions that distinguished between degrees of murder, retaining the mandatory death sentence only for murder in the first degree. Yet "[t]his new legislative criterion for isolating crimes appropriately punishable by death soon proved as unsuccessful as the concept of 'malice aforethought,'" *ibid.,* the common-law means of separating murder from manslaughter. Not only was the distinction between degrees of murder confusing and uncertain in practice, but even in clear cases of first-degree murder juries continued to take the law into

[50] Eight States still employ hanging as the method of execution, and one, Utah, also employs shooting. These nine States have accounted for less than 3% of the executions in the United States since 1930. National Prisoner Statistics, *supra,* n. 40, at 10–11.

[51] *Id.,* at 8.

their own hands: if they felt that death was an inappropriate punishment, "they simply refused to convict of the capital offense." *Id.*, at 199. The phenomenon of jury nullification thus remained to counteract the rigors of mandatory death sentences. Bowing to reality, "legislatures did not try, as before, to refine further the definition of capital homicides. Instead they adopted the method of forthrightly granting juries the discretion which they had been exercising in fact." *Ibid.* In consequence, virtually all death sentences today are discretionarily imposed. Finally, it is significant that nine States no longer inflict the punishment of death under any circumstances,[52] and five others have restricted it to extremely rare crimes.[53]

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[52] Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia, and Wisconsin have abolished death as a punishment for crimes. *Id.*, at 50. In addition, the California Supreme Court held the punishment unconstitutional under the state counterpart of the Cruel and Unusual Punishments Clause. *People* v. *Anderson*, 6 Cal. 3d 628, 493 P. 2d 880 (1972).

[53] New Mexico, New York, North Dakota, Rhode Island, and Vermont have almost totally abolished death as a punishment for crimes. National Prisoner Statistics, *supra*, n. 40, at 50. Indeed, these five States might well be considered *de facto* abolition States. North Dakota and Rhode Island, which restricted the punishment in 1915 and 1852 respectively, have not carried out an execution since at least 1930, *id.*, at 10; nor have there been any executions in New York, Vermont, or New Mexico since they restricted the punishment in 1965, 1965, and 1969 respectively, *id.*, at 10–11. As of January 1, 1971, none of the five States had even a single prisoner under sentence of death. *Id.*, at 18–19.

In addition, six States, while retaining the punishment on the books in generally applicable form, have made virtually no use of it. Since 1930, Idaho, Montana, Nebraska, New Hampshire, South Dakota, and Wyoming have carried out a total of 22 executions. *Id.*, at 10–11. As of January 1, 1971, these six States had a total of three prisoners under sentences of death. *Id.*, at 18–19. Hence, assuming 25 executions in 42 years, each State averaged about one execution every 10 years.

Thus, although "the death penalty has been employed throughout our history," *Trop* v. *Dulles,* 356 U. S., at 99, in fact the history of this punishment is one of successive restriction. What was once a common punishment has become, in the context of a continuing moral debate, increasingly rare. The evolution of this punishment evidences, not that it is an inevitable part of the American scene, but that it has proved progressively more troublesome to the national conscience. The result of this movement is our current system of administering the punishment, under which death sentences are rarely imposed and death is even more rarely inflicted. It is, of course, "We, the People" who are responsible for the rarity both of the imposition and the carrying out of this punishment. Juries, "express[ing] the conscience of the community on the ultimate question of life or death," *Witherspoon* v. *Illinois,* 391 U. S., at 519, have been able to bring themselves to vote for death in a mere 100 or so cases among the thousands tried each year where the punishment is available. Governors, elected by and acting for us, have regularly commuted a substantial number of those sentences. And it is our society that insists upon due process of law to the end that no person will be unjustly put to death, thus ensuring that many more of those sentences will not be carried out. In sum, we have made death a rare punishment today.

The progressive decline in, and the current rarity of, the infliction of death demonstrate that our society seriously questions the appropriateness of this punishment today. The States point out that many legislatures authorize death as the punishment for certain crimes and that substantial segments of the public, as reflected in opinion polls and referendum votes, continue to support it. Yet the availability of this punishment through statutory authorization, as well as the polls and refer-

enda, which amount simply to approval of that authorization, simply underscores the extent to which our society has in fact rejected this punishment. When an unusually severe punishment is authorized for wide-scale application but not, because of society's refusal, inflicted save in a few instances, the inference is compelling that there is a deep-seated reluctance to inflict it. Indeed, the likelihood is great that the punishment is tolerated only because of its disuse. The objective indicator of society's view of an unusually severe punishment is what society does with it, and today society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute. At the very least, I must conclude that contemporary society views this punishment with substantial doubt.

The final principle to be considered is that an unusually severe and degrading punishment may not be excessive in view of the purposes for which it is inflicted. This principle, too, is related to the others. When there is a strong probability that the State is arbitrarily inflicting an unusually severe punishment that is subject to grave societal doubts, it is likely also that the punishment cannot be shown to be serving any penal purpose that could not be served equally well by some less severe punishment.

The States' primary claim is that death is a necessary punishment because it prevents the commission of capital crimes more effectively than any less severe punishment. The first part of this claim is that the infliction of death is necessary to stop the individuals executed from committing further crimes. The sufficient answer to this is that if a criminal convicted of a capital crime poses a danger to society, effective administration of the State's pardon and parole laws can delay or deny his release from prison, and techniques of isolation can elim-

inate or minimize the danger while he remains confined.

The more significant argument is that the threat of death prevents the commission of capital crimes because it deters potential criminals who would not be deterred by the threat of imprisonment. The argument is not based upon evidence that the threat of death is a superior deterrent. Indeed, as my Brother MARSHALL establishes, the available evidence uniformly indicates, although it does not conclusively prove, that the threat of death has no greater deterrent effect than the threat of imprisonment. The States argue, however, that they are entitled to rely upon common human experience, and that experience, they say, supports the conclusion that death must be a more effective deterrent than any less severe punishment. Because people fear death the most, the argument runs, the threat of death must be the greatest deterrent.

It is important to focus upon the precise import of this argument. It is not denied that many, and probably most, capital crimes cannot be deterred by the threat of punishment. Thus the argument can apply only to those who think rationally about the commission of capital crimes. Particularly is that true when the potential criminal, under this argument, must not only consider the risk of punishment, but also distinguish between two possible punishments. The concern, then, is with a particular type of potential criminal, the rational person who will commit a capital crime knowing that the punishment is long-term imprisonment, which may well be for the rest of his life, but will not commit the crime knowing that the punishment is death. On the face of it, the assumption that such persons exist is implausible.

In any event, this argument cannot be appraised in the abstract. We are not presented with the theoretical question whether under any imaginable circumstances the

threat of death might be a greater deterrent to the commission of capital crimes than the threat of imprisonment. We are concerned with the practice of punishing criminals by death as it exists in the United States today. Proponents of this argument necessarily admit that its validity depends upon the existence of a system in which the punishment of death is invariably and swiftly imposed. Our system, of course, satisfies neither condition. A rational person contemplating a murder or rape is confronted, not with the certainty of a speedy death, but with the slightest possibility that he will be executed in the distant future. The risk of death is remote and improbable; in contrast, the risk of long-term imprisonment is near and great. In short, whatever the speculative validity of the assumption that the threat of death is a superior deterrent, there is no reason to believe that as currently administered the punishment of death is necessary to deter the commission of capital crimes. Whatever might be the case were all or substantially all eligible criminals quickly put to death, unverifiable possibilities are an insufficient basis upon which to conclude that the threat of death today has any greater deterrent efficacy than the threat of imprisonment.[54]

[54] There is also the more limited argument that death is a necessary punishment when criminals are already serving or subject to a sentence of life imprisonment. If the only punishment available is further imprisonment, it is said, those criminals will have nothing to lose by committing further crimes, and accordingly the threat of death is the sole deterrent. But "life" imprisonment is a misnomer today. Rarely, if ever, do crimes carry a mandatory life sentence without possibility of parole. That possibility ensures that criminals do not reach the point where further crimes are free of consequences. Moreover, if this argument is simply an assertion that the threat of death is a more effective deterrent than the threat of increased imprisonment by denial of release on parole, then, as noted above, there is simply no evidence to support it.

There is, however, another aspect to the argument that the punishment of death is necessary for the protection of society. The infliction of death, the States urge, serves to manifest the community's outrage at the commission of the crime. It is, they say, a concrete public expression of moral indignation that inculcates respect for the law and helps assure a more peaceful community. Moreover, we are told, not only does the punishment of death exert this widespread moralizing influence upon community values, it also satisfies the popular demand for grievous condemnation of abhorrent crimes and thus prevents disorder, lynching, and attempts by private citizens to take the law into their own hands.

The question, however, is not whether death serves these supposed purposes of punishment, but whether death serves them more effectively than imprisonment. There is no evidence whatever that utilization of imprisonment rather than death encourages private blood feuds and other disorders. Surely if there were such a danger, the execution of a handful of criminals each year would not prevent it. The assertion that death alone is a sufficiently emphatic denunciation for capital crimes suffers from the same defect. If capital crimes require the punishment of death in order to provide moral reinforcement for the basic values of the community, those values can only be undermined when death is so rarely inflicted upon the criminals who commit the crimes. Furthermore, it is certainly doubtful that the infliction of death by the State does in fact strengthen the community's moral code; if the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life and brutalize our values. That, after all, is why we no longer carry out public executions. In any event, this claim simply means that one purpose of punishment is to indicate social disapproval of crime. To serve that purpose our

laws distribute punishments according to the gravity of crimes and punish more severely the crimes society regards as more serious. That purpose cannot justify any particular punishment as the upper limit of severity.

There is, then, no substantial reason to believe that the punishment of death, as currently administered, is necessary for the protection of society. The only other purpose suggested, one that is independent of protection for society, is retribution. Shortly stated, retribution in this context means that criminals are put to death because they deserve it.

Although it is difficult to believe that any State today wishes to proclaim adherence to "naked vengeance," *Trop* v. *Dulles*, 356 U. S., at 112 (BRENNAN, J., concurring), the States claim, in reliance upon its statutory authorization, that death is the only fit punishment for capital crimes and that this retributive purpose justifies its infliction. In the past, judged by its statutory authorization, death was considered the only fit punishment for the crime of forgery, for the first federal criminal statute provided a mandatory death penalty for that crime. Act of April 30, 1790, § 14, 1 Stat. 115. Obviously, concepts of justice change; no immutable moral order requires death for murderers and rapists. The claim that death is a just punishment necessarily refers to the existence of certain public beliefs. The claim must be that for capital crimes death alone comports with society's notion of proper punishment. As administered today, however, the punishment of death cannot be justified as a necessary means of exacting retribution from criminals. When the overwhelming number of criminals who commit capital crimes go to prison, it cannot be concluded that death serves the purpose of retribution more effectively than imprisonment. The asserted public belief that murderers and rapists deserve to die is flatly inconsistent with the execution of a random

few. As the history of the punishment of death in this country shows, our society wishes to prevent crime; we have no desire to kill criminals simply to get even with them.

In sum, the punishment of death is inconsistent with all four principles: Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not.

IV

When this country was founded, memories of the Stuart horrors were fresh and severe corporal punishments were common. Death was not then a unique punishment. The practice of punishing criminals by death, moreover, was widespread and by and large acceptable to society. Indeed, without developed prison systems, there was frequently no workable alternative. Since that time, successive restrictions, imposed against the background of a continuing moral controversy, have drastically curtailed the use of this punishment. Today death is a uniquely and unusually severe punishment. When examined by the principles applicable under the Cruel and Unusual Punishments Clause, death stands condemned as fatally offensive to human dignity. The punishment of death is therefore "cruel and unusual," and the States may no longer inflict it as a punishment for crimes. Rather than kill an arbitrary handful of criminals each year, the States will confine them in prison. "The State thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime

is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal." *Weems* v. *United States*, 217 U. S., at 381.

I concur in the judgments of the Court.

MR. JUSTICE STEWART, concurring.

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

For these and other reasons, at least two of my Brothers have concluded that the infliction of the death penalty is constitutionally impermissible in all circumstances under the Eighth and Fourteenth Amendments. Their case is a strong one. But I find it unnecessary to reach the ultimate question they would decide. See *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 347 (Brandeis, J., concurring).

The opinions of other Justices today have set out in admirable and thorough detail the origins and judicial history of the Eighth Amendment's guarantee against the infliction of cruel and unusual punishments,[1] and the origin and judicial history of capital punishment.[2] There

[1] See dissenting opinion of THE CHIEF JUSTICE, *post*, at 376–379; concurring opinion of MR. JUSTICE DOUGLAS, *ante*, at 242–244; concurring opinion of MR. JUSTICE BRENNAN, *ante*, at 258–269; concurring opinion of MR. JUSTICE MARSHALL, *post*, at 316–328; dissenting opinion of MR. JUSTICE BLACKMUN, *post*, at 407–409; dissenting opinion of MR. JUSTICE POWELL, *post*, at 421–427.

[2] See dissenting opinion of THE CHIEF JUSTICE, *post*, at 380; concurring opinion of MR. JUSTICE BRENNAN, *ante*, at 282–285; concurring opinion of MR. JUSTICE MARSHALL, *post*, at 333–341; dissenting opinion of MR. JUSTICE POWELL, *post*, at 421–424.

is thus no need for me to review the historical materials here, and what I have to say can, therefore, be briefly stated.

Legislatures—state and federal—have sometimes specified that the penalty of death shall be the mandatory punishment for every person convicted of engaging in certain designated criminal conduct. Congress, for example, has provided that anyone convicted of acting as a spy for the enemy in time of war shall be put to death.[3] The Rhode Island Legislature has ordained the death penalty for a life term prisoner who commits murder.[4] Massachusetts has passed a law imposing the death penalty upon anyone convicted of murder in the commission of a forcible rape.[5] An Ohio law imposes the mandatory penalty of death upon the assassin of the President of the United States or the Governor of a State.[6]

If we were reviewing death sentences imposed under these or similar laws, we would be faced with the need to decide whether capital punishment is unconstitutional for all crimes and under all circumstances. We would need to decide whether a legislature—state or federal—could constitutionally determine that certain criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator, and that, despite the inconclusive empirical evidence,[7] only

[3] 10 U. S. C. § 906.

[4] R. I. Gen. Laws Ann. § 11–23–2.

[5] Mass. Gen. Laws Ann., c. 265, § 2.

[6] Ohio Rev. Code Ann., Tit. 29, §§ 2901.09 and 2901.10.

[7] Many statistical studies—comparing crime rates in jurisdictions with and without capital punishment and in jurisdictions before and after abolition of capital punishment—have indicated that there is little, if any, measurable deterrent effect. See H. Bedau, The Death Penalty in America 258–332 (1967 rev. ed.). There remains uncertainty, however, because of the difficulty of identifying and holding constant all other relevant variables. See Comment, The Death

the automatic penalty of death will provide maximum deterrence.

On that score I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.

The constitutionality of capital punishment in the abstract is not, however, before us in these cases. For the Georgia and Texas Legislatures have not provided that the death penalty shall be imposed upon all those who are found guilty of forcible rape.[8] And the Georgia Legislature has not ordained that death shall be the automatic punishment for murder.[9] In a word, neither State

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Penalty Cases, 56 Calif. L. Rev. 1268, 1275–1292. See also dissenting opinion of THE CHIEF JUSTICE, *post*, at 395; concurring opinion of MR. JUSTICE MARSHALL, *post*, at 346–354.

[8] Georgia law, at the time of the conviction and sentencing of the petitioner in No. 69–5030, left the jury a choice between the death penalty, life imprisonment, or "imprisonment and labor in the penitentiary for not less than one year nor more than 20 years." Ga. Code Ann. § 26–1302 (Supp. 1971) (effective prior to July 1, 1969). The current Georgia provision for the punishment of forcible rape continues to leave the same broad sentencing leeway. Ga. Crim. Code § 26–2001 (1971 rev.) (effective July 1, 1969). Texas law, under which the petitioner in No. 69–5031 was sentenced, provides that a "person guilty of rape shall be punished by death or by confinement in the penitentiary for life, or for any term of years not less than five." Texas Penal Code, Art. 1189.

[9] Georgia law, under which the petitioner in No. 69–5003, was sentenced, left the jury a choice between the death penalty and life imprisonment. Ga. Code Ann. § 26–1005 (Supp. 1971) (effective

has made a legislative determination that forcible rape and murder can be deterred only by imposing the penalty of death upon all who perpetrate those offenses. As MR. JUSTICE WHITE so tellingly puts it, the "legislative will is not frustrated if the penalty is never imposed." *Post*, at 311.

Instead, the death sentences now before us are the product of a legal system that brings them, I believe, within the very core of the Eighth Amendment's guarantee against cruel and unusual punishments, a guarantee applicable against the States through the Fourteenth Amendment. *Robinson* v. *California*, 370 U. S. 660. In the first place, it is clear that these sentences are "cruel" in the sense that they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary. *Weems* v. *United States*, 217 U. S. 349. In the second place, it is equally clear that these sentences are "unusual" in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare.[10] But I do not rest my conclusion upon these two propositions alone.

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968,[11] many just as reprehensible as these, the petitioners are among a capriciously

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prior to July 1, 1969). Current Georgia law provides for similar sentencing leeway. Ga. Crim. Code § 26–1101 (1971 rev.) (effective July 1, 1969).

[10] See dissenting opinion of THE CHIEF JUSTICE, *post*, at 386–387, n. 11; concurring opinion of MR. JUSTICE BRENNAN, *ante*, at 291–293.

[11] Petitioner Branch was sentenced to death in a Texas court on July 26, 1967. Petitioner Furman was sentenced to death in a Georgia court on September 20, 1968. Petitioner Jackson was sentenced to death in a Georgia court on December 10, 1968.

selected random handful upon whom the sentence of death has in fact been imposed.[12] My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.[13] See *McLaughlin* v. *Florida*, 379 U. S. 184. But racial discrimination has not been proved,[14] and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

For these reasons I concur in the judgments of the Court.

MR. JUSTICE WHITE, concurring.

The facial constitutionality of statutes requiring the imposition of the death penalty for first-degree murder, for more narrowly defined categories of murder, or for rape would present quite different issues under the Eighth Amendment than are posed by the cases before us. In joining the Court's judgments, therefore, I do not at all

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[12] A former United States Attorney General has testified before the Congress that only a "small and capricious selection of offenders have been put to death. Most persons convicted of the same crimes have been imprisoned." Statement by Attorney General Clark in Hearings on S. 1760 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 2d Sess., 93.

In *McGautha* v. *California*, 402 U. S. 183, the Court dealt with claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. We expressly declined in that case to consider claims under the constitutional guarantee against cruel and unusual punishments. See 398 U. S. 936 (limited grant of certiorari).

[13] See concurring opinion of MR. JUSTICE DOUGLAS, *ante*, at 249–251; concurring opinion of MR. JUSTICE MARSHALL, *post*, at 366 n. 155.

[14] Cf. Note, A Study of the California Penalty Jury in First-Degree-Murder Cases, 21 Stan. L. Rev. 1297 (1969); dissenting opinion of THE CHIEF JUSTICE, *post*, at 389–390, n. 12.

intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the Eighth Amendment. That question, ably argued by several of my Brethren, is not presented by these cases and need not be decided.

The narrower question to which I address myself concerns the constitutionality of capital punishment statutes under which (1) the legislature authorizes the imposition of the death penalty for murder or rape; (2) the legislature does not itself mandate the penalty in any particular class or kind of case (that is, legislative will is not frustrated if the penalty is never imposed), but delegates to judges or juries the decisions as to those cases, if any, in which the penalty will be utilized; and (3) judges and juries have ordered the death penalty with such infrequency that the odds are now very much against imposition and execution of the penalty with respect to any convicted murderer or rapist. It is in this context that we must consider whether the execution of these petitioners would violate the Eighth Amendment.

I begin with what I consider a near truism: that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system. It is perhaps true that no matter how infrequently those convicted of rape or murder are executed, the penalty so imposed is not disproportionate to the crime and those executed may deserve exactly what they received. It would also be clear that executed defendants are finally and completely incapacitated from again committing rape or murder or any other crime. But when imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied. Nor could it be said with confidence that society's need for specific deterrence justifies death

for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient, or that community values are measurably reinforced by authorizing a penalty so rarely invoked.

Most important, a major goal of the criminal law—to deter others by punishing the convicted criminal—would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others. For present purposes I accept the morality and utility of punishing one person to influence another. I accept also the effectiveness of punishment generally and need not reject the death penalty as a more effective deterrent than a lesser punishment. But common sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted.

The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment. It is my view that it would, for its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.

It is also my judgment that this point has been reached with respect to capital punishment as it is presently ad-

ministered under the statutes involved in these cases. Concededly, it is difficult to prove as a general proposition that capital punishment, however administered, more effectively serves the ends of the criminal law than does imprisonment. But however that may be, I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.

I need not restate the facts and figures that appear in the opinions of my Brethren. Nor can I "prove" my conclusion from these data. But, like my Brethren, I must arrive at judgment; and I can do no more than state a conclusion based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty. That conclusion, as I have said, is that the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not. The short of it is that the policy of vesting sentencing authority primarily in juries—a decision largely motivated by the desire to mitigate the harshness of the law and to bring community judgment to bear on the sentence as well as guilt or innocence—has so effectively achieved its aims that capital punishment within the confines of the statutes now before us has for all practical purposes run its course.

Judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires. In this respect, Eighth Amendment cases come to us in no different posture. It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the

constitutionality of punishment and that there are punishments that the Amendment would bar whether legislatively approved or not. Inevitably, then, there will be occasions when we will differ with Congress or state legislatures with respect to the validity of punishment. There will also be cases in which we shall strongly disagree among ourselves. Unfortunately, this is one of them. But as I see it, this case is no different in kind from many others, although it may have wider impact and provoke sharper disagreement.

In this respect, I add only that past and present legislative judgment with respect to the death penalty loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and the fact that a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime. Legislative "policy" is thus necessarily defined not by what is legislatively authorized but by what juries and judges do in exercising the discretion so regularly conferred upon them. In my judgment what was done in these cases violated the Eighth Amendment.

I concur in the judgments of the Court.

MR. JUSTICE MARSHALL, concurring.

These three cases present the question whether the death penalty is a cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution.[1]

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[1] Certiorari was also granted in a fourth case, *Aikens* v. *California*, No. 68–5027, but the writ was dismissed after the California Supreme Court held that capital punishment violates the State Constitution. 406 U. S. 813. See *People* v. *Anderson*, 6 Cal. 3d 628, 493 P. 2d 880, cert. denied, 406 U. S. 958 (1972). The California decision reduced by slightly more than 100 the number of persons currently awaiting execution.

In No. 69–5003, Furman was convicted of murder for shooting the father of five children when he discovered that Furman had broken into his home early one morning. Nos. 69–5030 and 69–5031 involve state convictions for forcible rape. Jackson was found guilty of rape during the course of a robbery in the victim's home. The rape was accomplished as he held the pointed ends of scissors at the victim's throat. Branch also was convicted of a rape committed in the victim's home. No weapon was utilized, but physical force and threats of physical force were employed.

The criminal acts with which we are confronted are ugly, vicious, reprehensible acts. Their sheer brutality cannot and should not be minimized. But, we are not called upon to condone the penalized conduct; we are asked only to examine the penalty imposed on each of the petitioners and to determine whether or not it violates the Eighth Amendment. The question then is not whether we condone rape or murder, for surely we do not; it is whether capital punishment is "a punishment no longer consistent with our own self-respect" [2] and, therefore, violative of the Eighth Amendment.

The elasticity of the constitutional provision under consideration presents dangers of too little or too much self-restraint.[3] Hence, we must proceed with caution to answer the question presented.[4] By first examining the historical derivation of the Eighth Amendment and

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[2] 268 Parl. Deb., H. L. (5th ser.) 703 (1965) (Lord Chancellor Gardiner).

[3] Compare, *e. g.*, *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 470 (1947) (Frankfurter, J., concurring), with F. Frankfurter, Of Law and Men 81 (1956). See *In re Anderson*, 69 Cal. 2d 613, 634–635, 447 P. 2d 117, 131–132 (1968) (Mosk, J., concurring); cf. *McGautha* v. *California*, 402 U. S. 183, 226 (1971) (separate opinion of Black, J.); *Witherspoon* v. *Illinois*, 391 U. S. 510, 542 (1968) (WHITE, J., dissenting).

[4] See generally Frankel, Book Review, 85 Harv. L. Rev. 354, 362 (1971).

the construction given it in the past by this Court, and then exploring the history and attributes of capital punishment in this country, we can answer the question presented with objectivity and a proper measure of self-restraint.

Candor is critical to such an inquiry. All relevant material must be marshaled and sorted and forthrightly examined. We must not only be precise as to the standards of judgment that we are utilizing, but exacting in examining the relevant material in light of those standards.

Candor compels me to confess that I am not oblivious to the fact that this is truly a matter of life and death. Not only does it involve the lives of these three petitioners, but those of the almost 600 other condemned men and women in this country currently awaiting execution. While this fact cannot affect our ultimate decision, it necessitates that the decision be free from any possibility of error.

I

The Eighth Amendment's ban against cruel and unusual punishments derives from English law. In 1583, John Whitgift, Archbishop of Canterbury, turned the High Commission into a permanent ecclesiastical court, and the Commission began to use torture to extract confessions from persons suspected of various offenses.[5] Sir Robert Beale protested that cruel and barbarous torture violated Magna Carta, but his protests were made in vain.[6]

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[5] Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839, 848 (1969).

[6] *Ibid.* Beale's views were conveyed from England to America and were first written into American law by the Reverend Nathaniel Ward who wrote the Body of Liberties for the Massachusetts Bay Colony. Clause 46 of that work read: "For bodilie punishments

Cruel punishments were not confined to those accused of crimes, but were notoriously applied with even greater relish to those who were convicted. Blackstone described in ghastly detail the myriad of inhumane forms of punishment imposed on persons found guilty of any of a large number of offenses.[7] Death, of course, was the usual result.[8]

The treason trials of 1685—the "Bloody Assizes"—which followed an abortive rebellion by the Duke of Monmouth, marked the culmination of the parade of horrors, and most historians believe that it was this event that finally spurred the adoption of the English Bill of Rights containing the progenitor of our prohibition against cruel and unusual punishments.[9] The conduct of Lord Chief Justice Jeffreys at those trials has been described as an "insane lust for cruelty" which was "stimulated by orders from the King" (James II).[10] The assizes received wide publicity from Puritan pamphleteers and doubtless had some influence on the adoption of a cruel and unusual punishments clause. But,

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we allow amongst us none that are inhumane, Barbarous or cruel." 1 B. Schwartz, The Bill of Rights: A Documentary History 71, 77 (1971).

[7] 4 W. Blackstone, Commentaries *376–377. See also 1 J. Chitty, The Criminal Law 785–786 (5th ed. 1847); Sherman, ". . . Nor Cruel and Unusual Punishments Inflicted," 14 Crime & Delin. 73, 74 (1968).

[8] Not content with capital punishment as a means of retribution for crimes, the English also provided for attainder ("dead in law") as the immediate and inseparable concomitant of the death sentence. The consequences of attainder were forfeiture of real and personal estates and corruption of blood. An attainted person could not inherit land or other hereditaments, nor retain those he possessed, nor transmit them by descent to any heir. Descents were also obstructed whenever posterity derived a title through one who was attainted. 4 W. Blackstone, Commentaries *380–381.

[9] *E. g.*, 2 J. Story, On the Constitution § 1903, p. 650 (5th ed. 1891).

[10] 2 G. Trevelyan, History of England 467 (1952 reissue).

the legislative history of the English Bill of Rights of 1689 indicates that the assizes may not have been as critical to the adoption of the clause as is widely thought. After William and Mary of Orange crossed the channel to invade England, James II fled. Parliament was summoned into session and a committee was appointed to draft general statements containing "such things as are absolutely necessary to be considered for the better securing of our religion, laws and liberties." [11] An initial draft of the Bill of Rights prohibited "illegal" punishments, but a later draft referred to the infliction by James II of "illegal and cruel" punishments, and declared "cruel and unusual" punishments to be prohibited.[12] The use of the word "unusual" in the final draft appears to be inadvertent.

This legislative history has led at least one legal historian to conclude "that the cruel and unusual punishments clause of the Bill of Rights of 1689 was, first, an objection to the imposition of punishments that were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties," [13] and not primarily a reaction to the torture of the High Commission, harsh sentences, or the assizes.

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[11] Granucci, *supra*, n. 5, at 854.

[12] *Id.*, at 855.

[13] *Id.*, at 860. In reaching this conclusion, Professor Granucci relies primarily on the trial of Titus Oates as the impetus behind the adoption of the clause. Oates was a minister of the Church of England who proclaimed the existence of a plot to assassinate King Charles II. He was tried for perjury, convicted, and sentenced to a fine of 2,000 marks, life imprisonment, whippings, pillorying four times a year, and defrocking. Oates petitioned both the House of Commons and the House of Lords for release from judgment. The House of Lords rejected his petition, but a minority of its members concluded that the King's Bench had no jurisdiction to compel de-

Whether the English Bill of Rights prohibition against cruel and unusual punishments is properly read as a response to excessive or illegal punishments, as a reaction to barbaric and objectionable modes of punishment, or as both, there is no doubt whatever that in borrowing the language and in including it in the Eighth Amendment, our Founding Fathers intended to outlaw torture and other cruel punishments.[14]

The precise language used in the Eighth Amendment first appeared in America on June 12, 1776, in Virginia's "Declaration of Rights," § 9 of which read: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." [15] This language was drawn verbatim from the English Bill of Rights of 1689. Other States adopted similar clauses,[16] and there is evidence in the debates of the various state conventions that were

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frocking and that the other punishments were barbarous, inhumane, unchristian, and unauthorized by law. The House of Commons agreed with the dissenting Lords. *Id.*, at 857–859.

The author also relies on the dictionary definition of "cruel," which meant "severe" or "hard" in the 17th century, to support his conclusion. *Ibid.*

[14] Most historians reach this conclusion by reading the history of the Cruel and Unusual Punishments Clause as indicating that it was a reaction to inhumane punishments. Professor Granucci reaches the same conclusion by finding that the draftsmen of the Constitution misread the British history and erroneously relied on Blackstone. Granucci, *supra*, n. 5, at 862–865. It is clear, however, that prior to the adoption of the Amendment there was some feeling that a safeguard against cruelty was needed and that this feeling had support in past practices. See n. 6, *supra*, and accompanying text.

[15] Grannucci, *supra*, n. 5, at 840; 1 Schwartz, *supra*, n. 6, at 276, 278.

[16] See, *e. g.*, Delaware Declaration of Rights (1776), Maryland Declaration of Rights (1776), Massachusetts Declaration of Rights (1780), and New Hampshire Bill of Rights (1783). 1 Schwartz, *supra*, n. 6, at 276, 278; 279, 281; 337, 343; 374, 379.

called upon to ratify the Constitution of great concern for the omission of any prohibition against torture or other cruel punishments.[17]

The Virginia Convention offers some clues as to what the Founding Fathers had in mind in prohibiting cruel and unusual punishments. At one point George Mason advocated the adoption of a Bill of Rights, and Patrick Henry concurred, stating:

> "By this Constitution, some of the best barriers of human rights are thrown away. Is there not an additional reason to have a bill of rights? . . . Congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence—petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But, when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives. What says our bill of rights?—'that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' Are you not, therefore, now calling on those gentlemen who are to compose Congress, to prescribe trials and define punishments without this control? Will they find sentiments there similar to this bill of rights? You let them loose; you do more — you depart from the genius of your country. . . .
>
> "In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and in-

[17] See 2 J. Elliot's Debates 111 (2d ed. 1876); 3 *id.*, at 447–481. See also, 2 Schwartz, *supra*, n. 6, at 629, 674, 762, 852, 968.

> flicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone." [18]

Henry's statement indicates that he wished to insure that "relentless severity" would be prohibited by the Constitution. Other expressions with respect to the proposed Eighth Amendment by Members of the First Congress indicate that they shared Henry's view of the need for and purpose of the Cruel and Unusual Punishments Clause.[19]

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[18] 3 Elliot, *supra*, n. 17, at 446–448. A comment by George Mason which misinterprets a criticism leveled at himself and Patrick Henry is further evidence of the intention to prohibit torture and the like by prohibiting cruel and unusual punishments. *Id.*, at 452.

[19] 1 Annals of Cong. 782–783 (1789). There is some recognition of the fact that a prohibition against cruel and unusual punishments is a flexible prohibition that may change in meaning as the mores of a society change, and that may eventually bar certain punishments not barred when the Constitution was adopted. *Ibid.* (remarks of Mr. Livermore of New Hampshire). There is also evidence that the general opinion at the time the Eighth Amendment was adopted was that it prohibited every punishment that was not "evidently necessary." W. Bradford, An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania (1793), reprinted in 12 Am. J. Legal Hist. 122, 127 (1968).

Thus, the history of the clause clearly establishes that it was intended to prohibit cruel punishments. We must now turn to the case law to discover the manner in which courts have given meaning to the term "cruel."

II

This Court did not squarely face the task of interpreting the cruel and unusual punishments language for the first time until *Wilkerson* v. *Utah*, 99 U. S. 130 (1879), although the language received a cursory examination in several prior cases. See, *e. g.*, *Pervear* v. *Commonwealth*, 5 Wall. 475 (1867). In *Wilkerson*, the Court unanimously upheld a sentence of public execution by shooting imposed pursuant to a conviction for premeditated murder. In his opinion for the Court, Mr. Justice Clifford wrote:

> "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution." 99 U. S., at 135-136.

Thus, the Court found that unnecessary cruelty was no more permissible than torture. To determine whether the punishment under attack was unnecessarily cruel, the Court examined the history of the Utah Territory and the then-current writings on capital punishment, and compared this Nation's practices with those of other countries. It is apparent that the Court felt it could not dispose of the question simply by referring to traditional practices; instead, it felt bound to examine developing thought.

Eleven years passed before the Court again faced a challenge to a specific punishment under the Eighth

Amendment. In the case of *In re Kemmler,* 136 U. S. 436 (1890), Chief Justice Fuller wrote an opinion for a unanimous Court upholding electrocution as a permissible mode of punishment. While the Court ostensibly held that the Eighth Amendment did not apply to the States, it is very apparent that the nature of the punishment involved was examined under the Due Process Clause of the Fourteenth Amendment. The Court held that the punishment was not objectionable. Today, *Kemmler* stands primarily for the proposition that a punishment is not necessarily unconstitutional simply because it is unusual, so long as the legislature has a humane purpose in selecting it.[20]

Two years later in *O'Neil* v. *Vermont,* 144 U. S. 323 (1892), the Court reaffirmed that the Eighth Amendment was not applicable to the States. O'Neil was found guilty on 307 counts of selling liquor in violation of Vermont law. A fine of $6,140 ($20 for each offense) and the costs of prosecution ($497.96) were imposed. O'Neil was committed to prison until the fine and the costs were paid; and the court provided that if they were not paid before a specified date, O'Neil was to be confined in the house of corrections for 19,914 days (approximately 54 years) at hard labor. Three Justices—Field, Harlan, and Brewer—dissented. They maintained not only that the Cruel and Unusual Punishments Clause was applicable to the States, but that in O'Neil's case it had been violated. Mr. Justice Field wrote:

> "That designation [cruel and unusual], it is true, is usually applied to punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like, which

[20] The New York Court of Appeals had recognized the unusual nature of the execution, but attributed it to a legislative desire to minimize the pain of persons executed.

> are attended with acute pain and suffering. . . . The inhibition is directed, not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged. The whole inhibition is against that which is excessive . . . ." *Id.*, at 339–340.

In *Howard* v. *Fleming*, 191 U. S. 126 (1903), the Court, in essence, followed the approach advocated by the dissenters in *O'Neil*. In rejecting the claim that 10-year sentences for conspiracy to defraud were cruel and unusual, the Court (per Mr. Justice Brewer) considered the nature of the crime, the purpose of the law, and the length of the sentence imposed.

The Court used the same approach seven years later in the landmark case of *Weems* v. *United States*, 217 U. S. 349 (1910). Weems, an officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands, was convicted of falsifying a "public and official document." He was sentenced to 15 years' incarceration at hard labor with chains on his ankles, to an unusual loss of his civil rights, and to perpetual surveillance. Called upon to determine whether this was a cruel and unusual punishment, the Court found that it was.[21] The Court emphasized that the Constitution was not an "ephemeral" enactment, or one "designed to meet passing occasions." [22] Recognizing that "[t]ime works changes, [and] brings into existence new conditions and purposes," [23] the Court commented that "[i]n the application of a constitu-

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[21] The prohibition against cruel and unusual punishments relevant to Weems was that found in the Philippine Bill of Rights. It was, however, borrowed from the Eighth Amendment to the United States Constitution and had the same meaning. 217 U. S., at 367.

[22] *Id.*, at 373.

[23] *Ibid.*

tion . . . our contemplation cannot be only of what has been but of what may be." [24]

In striking down the penalty imposed on Weems, the Court examined the punishment in relation to the offense, compared the punishment to those inflicted for other crimes and to those imposed in other jurisdictions, and concluded that the punishment was excessive.[25] Justices White and Holmes dissented and argued that the cruel and unusual prohibition was meant to prohibit only those things that were objectionable at the time the Constitution was adopted.[26]

Weems is a landmark case because it represents the first time that the Court invalidated a penalty prescribed by a legislature for a particular offense. The Court made it plain beyond any reasonable doubt that excessive punishments were as objectionable as those that were inherently cruel. Thus, it is apparent that the dissenters' position in *O'Neil* had become the opinion of the Court in *Weems*.

Weems was followed by two cases that added little to our knowledge of the scope of the cruel and unusual language, *Badders* v. *United States*, 240 U. S. 391 (1916), and *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U. S. 407 (1921).[27] Then

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[24] *Ibid.*

[25] *Id.*, at 381.

[26] *Id.*, at 389–413. Mr. Justice Black expressed a similar point of view in his separate opinion in *McGautha* v. *California*, 402 U. S., at 226 (1971).

[27] Badders was found guilty on seven counts of using the mails as part of a scheme to defraud. He was sentenced to concurrent five-year sentences and to a $1,000 fine on each count. The Court summarily rejected his claim that the sentence was a cruel and unusual punishment. In *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U. S. 407 (1921), the Court upheld the denial of second-class mailing privileges to a newspaper that had allegedly printed articles conveying false reports of United States

came another landmark case, *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459 (1947).

Francis had been convicted of murder and sentenced to be electrocuted. The first time the current passed through him, there was a mechanical failure and he did not die. Thereafter, Francis sought to prevent a second electrocution on the ground that it would be a cruel and unusual punishment. Eight members of the Court assumed the applicability of the Eighth Amendment to the States.[28] The Court was virtually unanimous in agreeing that "[t]he traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain,"[29] but split 5–4 on whether Francis would, under the circumstances, be forced to undergo any excessive pain. Five members of the Court treated the case like *In re Kemmler* and held that the legislature adopted electrocution for a humane purpose, and that its will should not be thwarted because, in its desire to reduce pain and suffering in most cases, it may have inadvertently increased suffering in one particular case.[30]

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conduct during the First World War with intent to cause disloyalty. Mr. Justice Brandeis dissented and indicated his belief that the "punishment" was unusual and possibly excessive under *Weems* v. *United States*, 217 U. S. 349 (1910). There is nothing in either of these cases demonstrating a departure from the approach used in *Weems*, or adding anything to it.

[28] Mr. Justice Frankfurter was the only member of the Court unwilling to make this assumption. However, like Chief Justice Fuller in *In re Kemmler*, 136 U. S. 436 (1890), he examined the propriety of the punishment under the Due Process Clause of the Fourteenth Amendment. 329 U. S., at 471. As MR. JUSTICE POWELL makes clear, Mr. Justice Frankfurter's analysis was different only in form from that of his Brethren; in substance, his test was fundamentally identical to that used by the rest of the Court.

[29] *Id.*, at 463.

[30] English law required a second attempt at execution if the first attempt failed. L. Radzinowicz, A History of English Criminal Law 185–186 (1948).

The four dissenters felt that the case should be remanded for further facts.

As in *Weems*, the Court was concerned with excessive punishments. *Resweber* is perhaps most significant because the analysis of cruel and unusual punishment questions first advocated by the dissenters in *O'Neil* was at last firmly entrenched in the minds of an entire Court.

Trop v. *Dulles*, 356 U. S. 86 (1958), marked the next major cruel and unusual punishment case in this Court. Trop, a native-born American, was declared to have lost his citizenship by reason of a conviction by court-martial for wartime desertion. Writing for himself and Justices Black, DOUGLAS, and Whittaker, Chief Justice Warren concluded that loss of citizenship amounted to a cruel and unusual punishment that violated the Eighth Amendment.[31]

Emphasizing the flexibility inherent in the words "cruel and unusual," the Chief Justice wrote that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." [32] His approach to the problem was that utilized by the Court in *Weems:* he scrutinized the severity of the penalty in relation to the offense, examined the practices of other civilized nations of the world, and concluded that involuntary statelessness was an excessive and, therefore, an unconstitutional punishment. Justice Frankfurter, dissenting, urged that expatriation was not punishment, and that even if it were, it was not excessive. While he criticized the conclusion arrived at by the Chief Justice, his approach to the Eighth Amendment question was identical.

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[31] MR. JUSTICE BRENNAN concurred and concluded that the statute authorizing deprivations of citizenship exceeded Congress' legislative powers. 356 U. S., at 114.

[32] *Id.*, at 101.

Whereas in *Trop* a majority of the Court failed to agree on whether loss of citizenship was a cruel and unusual punishment, four years later a majority did agree in *Robinson* v. *California*, 370 U. S. 660 (1962), that a sentence of 90 days' imprisonment for violation of a California statute making it a crime to "be addicted to the use of narcotics" was cruel and unusual. MR. JUSTICE STEWART, writing the opinion of the Court, reiterated what the Court had said in *Weems* and what Chief Justice Warren wrote in *Trop*—that the cruel and unusual punishment clause was not a static concept, but one that must be continually re-examined "in the light of contemporary human knowledge." [33] The fact that the penalty under attack was only 90 days evidences the Court's willingness to carefully examine the possible excessiveness of punishment in a given case even where what is involved is a penalty that is familiar and widely accepted.[34]

We distinguished *Robinson* in *Powell* v. *Texas*, 392 U. S. 514 (1968), where we sustained a conviction for drunkenness in a public place and a fine of $20. Four Justices dissented on the ground that *Robinson* was controlling. The analysis in both cases was the same; only the conclusion as to whether or not the punishment was excessive differed. *Powell* marked the last time prior to today's decision that the Court has had occasion to construe the meaning of the term "cruel and unusual" punishment.

Several principles emerge from these prior cases and serve as a beacon to an enlightened decision in the instant cases.

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[33] 370 U. S., at 666.

[34] *Robinson* v. *California*, 370 U. S. 660 (1962), removes any lingering doubts as to whether the Eighth Amendment's prohibition against cruel and unusual punishments is binding on the States. See also *Powell* v. *Texas*, 392 U. S. 514 (1968).

III

Perhaps the most important principle in analyzing "cruel and unusual" punishment questions is one that is reiterated again and again in the prior opinions of the Court: *i. e.*, the cruel and unusual language "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." [35] Thus, a penalty that was permissible at one time in our Nation's history is not necessarily permissible today.

The fact, therefore, that the Court, or individual Justices, may have in the past expressed an opinion that the death penalty is constitutional is not now binding on us. A fair reading of *Wilkerson* v. *Utah, supra; In re Kemmler, supra;* and *Louisiana ex rel. Francis* v. *Resweber, supra,* would certainly indicate an acceptance *sub silentio* of capital punishment as constitutionally permissible. Several Justices have also expressed their individual opinions that the death penalty is constitutional.[36] Yet, some of these same Justices and others have at times expressed concern over capital punishment.[37]

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[35] *Trop* v. *Dulles,* 356 U. S. 86, 101 (1958). See also *Weems* v. *United States,* 217 U. S., at 373; *Robinson* v. *California,* 370 U. S., at 666. See also n. 19, *supra.*

[36] *E. g., McGautha* v. *California,* 402 U. S., at 226 (separate opinion of Black, J.); *Trop* v. *Dulles, supra,* at 99 (Warren, C. J.), 125 (Frankfurter, J., dissenting).

[37] See, *e. g., Louisiana ex rel. Francis* v. *Resweber,* 329 U. S., at 474 (Burton, J., dissenting); *Trop* v. *Dulles, supra,* at 99 (Warren, C. J.); *Rudolph* v. *Alabama,* 375 U. S. 889 (1963) (Goldberg, J., dissenting from denial of certiorari); F. Frankfurter, Of Law and Men 81 (1956).

There is no violation of the principle of *stare decisis* in a decision that capital punishment now violates the Eighth Amendment. The last case that implied that capital punishment was still permissible was *Trop* v. *Dulles, supra,* at 99. Not only was the implication purely dictum, but it was also made in the context of a flexible analysis that recognized that as public opinion changed, the

There is no holding directly in point, and the very nature of the Eighth Amendment would dictate that unless a very recent decision existed, *stare decisis* would bow to changing values, and the question of the constitutionality of capital punishment at a given moment in history would remain open.

Faced with an open question, we must establish our standards for decision. The decisions discussed in the previous section imply that a punishment may be deemed cruel and unusual for any one of four distinct reasons.

First, there are certain punishments that inherently involve so much physical pain and suffering that civilized people cannot tolerate them—*e. g.*, use of the rack, the thumbscrew, or other modes of torture. See *O'Neil* v. *Vermont*, 144 U. S., at 339 (Field, J., dissenting). Regardless of public sentiment with respect to imposition of one of these punishments in a particular case or at any one moment in history, the Constitution prohibits it. These are punishments that have been barred since the adoption of the Bill of Rights.

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validity of the penalty would have to be re-examined. *Trop* v. *Dulles* is nearly 15 years old now, and 15 years change many minds about many things. MR. JUSTICE POWELL suggests, however, that our recent decisions in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), and *McGautha* v. *California*, 402 U. S. 183 (1971), imply that capital punishment is constitutionally permissible, because if they are viewed any other way they amount to little more than an academic exercise. In my view, this distorts the "rule of four" by which this Court decides which cases and which issues it will consider, and in what order. See *United States* v. *Generes*, 405 U. S. 93, 113 (1972) (DOUGLAS, J., dissenting). There are many reasons why four members of the Court might have wanted to consider the issues presented in those cases before considering the difficult question that is now before us. While I do not intend to catalogue these reasons here, it should suffice to note that I do not believe that those decisions can, in any way, fairly be used to support *any* inference whatever that the instant cases have already been disposed of *sub silentio*.

Second, there are punishments that are unusual, signifying that they were previously unknown as penalties for a given offense. Cf. *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson,* 255 U. S., at 435 (Brandeis, J., dissenting). If these punishments are intended to serve a humane purpose, they may be constitutionally permissible. *In re Kemmler,* 136 U. S., at 447; *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S., at 464. Prior decisions leave open the question of just how much the word "unusual" adds to the word "cruel." I have previously indicated that use of the word "unusual" in the English Bill of Rights of 1689 was inadvertent, and there is nothing in the history of the Eighth Amendment to give flesh to its intended meaning. In light of the meager history that does exist, one would suppose that an innovative punishment would probably be constitutional if no more cruel than that punishment which it superseded. We need not decide this question here, however, for capital punishment is certainly not a recent phenomenon.

Third, a penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose. *Weems* v. *United States, supra.* The decisions previously discussed are replete with assertions that one of the primary functions of the cruel and unusual punishments clause is to prevent excessive or unnecessary penalties, *e. g., Wilkerson* v. *Utah,* 99 U. S., at 134; *O'Neil* v. *Vermont,* 144 U. S., at 339–340 (Field, J., dissenting); *Weems* v. *United States,* 217 U. S., at 381; *Louisiana ex rel. Francis* v. *Resweber, supra;* these punishments are unconstitutional even though popular sentiment may favor them. Both THE CHIEF JUSTICE and MR. JUSTICE POWELL seek to ignore or to minimize this aspect of the Court's prior decisions. But, since Mr. Justice Field first suggested that "[t]he whole inhibition [of the prohibition against cruel and unusual punish-

ments] is against that which is excessive," *O'Neil* v. *Vermont*, 144 U. S., at 340, this Court has steadfastly maintained that a penalty is unconstitutional whenever it is unnecessarily harsh or cruel. This is what the Founders of this country intended; this is what their fellow citizens believed the Eighth Amendment provided; and this was the basis for our decision in *Robinson* v. *California*, *supra*, for the plurality opinion by Mr. Chief Justice Warren in *Trop* v. *Dulles*, *supra*, and for the Court's decision in *Weems* v. *United States*, *supra*. See also W. Bradford, An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania (1793), reprinted in 12 Am. J. Legal Hist. 122, 127 (1968). It should also be noted that the "cruel and unusual" language of the Eighth Amendment immediately follows language that prohibits *excessive* bail and *excessive* fines. The entire thrust of the Eighth Amendment is, in short, against "that which is excessive."

Fourth, where a punishment is not excessive and serves a valid legislative purpose, it still may be invalid if popular sentiment abhors it. For example, if the evidence clearly demonstrated that capital punishment served valid legislative purposes, such punishment would, nevertheless, be unconstitutional if citizens found it to be morally unacceptable. A general abhorrence on the part of the public would, in effect, equate a modern punishment with those barred since the adoption of the Eighth Amendment. There are no prior cases in this Court striking down a penalty on this ground, but the very notion of changing values requires that we recognize its existence.

It is immediately obvious, then, that since capital punishment is not a recent phenomenon, if it violates the Constitution, it does so because it is excessive or

unnecessary, or because it is abhorrent to currently existing moral values.

We must proceed to the history of capital punishment in the United States.

IV

Capital punishment has been used to penalize various forms of conduct by members of society since the beginnings of civilization. Its precise origins are difficult to perceive, but there is some evidence that its roots lie in violent retaliation by members of a tribe or group, or by the tribe or group itself, against persons committing hostile acts toward group members.[38] Thus, infliction of death as a penalty for objectionable conduct appears to have its beginnings in private vengeance.[39]

As individuals gradually ceded their personal prerogatives to a sovereign power, the sovereign accepted the authority to punish wrongdoing as part of its "divine right" to rule. Individual vengeance gave way to the vengeance of the state, and capital punishment became a public function.[40] Capital punishment worked its way into the laws of various countries,[41] and was inflicted in a variety of macabre and horrific ways.[42]

It was during the reign of Henry II (1154–1189) that English law first recognized that crime was more than a personal affair between the victim and the per-

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[38] Ancel, The Problem of the Death Penalty, in Capital Punishment 4–5 (T. Sellin ed. 1967); G. Scott, The History of Capital Punishment 1 (1950).

[39] Scott, *supra*, n. 38, at 1.

[40] *Id.*, at 2; Ancel, *supra*, n. 38, at 4–5.

[41] The Code of Hammurabi is one of the first known laws to have recognized the concept of an "eye for an eye," and consequently to have accepted death as an appropriate punishment for homicide. E. Block, And May God Have Mercy . . . 13–14 (1962).

[42] Scott, *supra*, n. 38, at 19–33.

petrator.[43] The early history of capital punishment in England is set forth in *McGautha* v. *California*, 402 U. S. 183, 197–200 (1971), and need not be repeated here.

By 1500, English law recognized eight major capital crimes: treason, petty treason (killing of husband by his wife), murder, larceny, robbery, burglary, rape, and arson.[44] Tudor and Stuart kings added many more crimes to the list of those punishable by death, and by 1688 there were nearly 50.[45] George II (1727–1760) added nearly 36 more, and George III (1760–1820) increased the number by 60.[46]

By shortly after 1800, capital offenses numbered more than 200 and not only included crimes against person and property, but even some against the public peace. While England may, in retrospect, look particularly brutal, Blackstone points out that England was fairly civilized when compared to the rest of Europe.[47]

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[43] *Id.*, at 5. Prior to this time, the laws of Alfred (871–901) provided that one who willfully slayed another should die, at least under certain circumstances. 3 J. Stephen, History of the Criminal Law of England 24 (1883). But, punishment was apparently left largely to private enforcement.

[44] T. Plucknett, A Concise History of the Common Law 424–454 (5th ed. 1956).

[45] Introduction in H. Bedau, The Death Penalty in America 1 (1967 rev. ed.).

[46] *Ibid.*

[47] 4 W. Blackstone, Commentaries *377. How many persons were actually executed for committing capital offenses is not known. See Bedau, *supra*, n. 45, at 3; L. Radzinowicz, A History of English Criminal Law 151, 153 (1948); Sellin, Two Myths in the History of Capital Punishment, 50 J. Crim. L. C. & P. S. 114 (1959). "Benefit of clergy" mitigated the harshness of the law somewhat. This concept arose from the struggle between church and state and originally provided that members of the clergy should be tried in ecclesiastical courts. Eventually all first offenders were entitled to "benefit of clergy." Bedau, *supra*, at 4.

Capital punishment was not as common a penalty in the American Colonies. "The Capitall Lawes of New-England," dating from 1636, were drawn by the Massachusetts Bay Colony and are the first written expression of capital offenses known to exist in this country. These laws make the following crimes capital offenses: idolatry, witchcraft, blasphemy, murder, assault in sudden anger, sodomy, buggery, adultery, statutory rape, rape, man-stealing, perjury in a capital trial, and rebellion. Each crime is accompanied by a reference to the Old Testament to indicate its source.[48] It is not known with any certainty exactly when, or even if, these laws were enacted as drafted; and, if so, just how vigorously these laws were enforced.[49] We do know that the other Colonies had a variety of laws that spanned the spectrum of severity.[50]

By the 18th century, the list of crimes became much less theocratic and much more secular. In the average colony, there were 12 capital crimes.[51] This was far fewer than existed in England, and part of the reason was that there was a scarcity of labor in the Colonies.[52] Still, there were many executions, because "[w]ith county jails inadequate and insecure, the criminal population seemed best controlled by death, mutilation, and fines." [53]

Even in the 17th century, there was some opposition

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[48] G. Haskins, The Capitall Lawes of New-England, Harv. L. Sch. Bull. 10–11 (Feb. 1956).

[49] Compare Haskins, *supra*, n. 48, with E. Powers, Crime and Punishment in Early Massachusetts, 1620–1692 (1966). See also Bedau, *supra*, n. 45, at 5.

[50] *Id.*, at 6.

[51] Filler, Movements to Abolish the Death Penalty in the United States, 284 Annals Am. Acad. Pol. & Soc. Sci. 124 (1952).

[52] *Ibid.*

[53] *Ibid.* (footnotes omitted).

to capital punishment in some of the colonies. In his "Great Act" of 1682, William Penn prescribed death only for premeditated murder and treason,[54] although his reform was not long lived.[55]

In 1776 the Philadelphia Society for Relieving Distressed Prisoners organized, and it was followed 11 years later by the Philadelphia Society for Alleviating the Miseries of Public Prisons.[56] These groups pressured for reform of all penal laws, including capital offenses. Dr. Benjamin Rush soon drafted America's first reasoned argument against capital punishment, entitled An Enquiry into the Effects of Public Punishments upon Criminals and upon Society.[57] In 1793, William Bradford, the Attorney General of Pennsylvania and later Attorney General of the United States, conducted "An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania." [58] He concluded that it was doubtful whether capital punishment was at all necessary, and that until more information could be obtained, it should be immediately eliminated for all offenses except high treason and murder.[59]

The "Enquiries" of Rush and Bradford and the Pennsylvania movement toward abolition of the death

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[54] *Ibid.*; *Bedau*, *supra*, n. 45, at 6.

[55] For an unknown reason, Pennsylvania adopted the harsher penal code of England upon William Penn's death in 1718. There was no evidence, however of an increase in crime between 1682 and 1718. Filler, *supra*, n. 51, at 124. In 1794, Pennsylvania eliminated capital punishment except for "murder of the first degree," which included all "willful, deliberate or premeditated" killings. The death penalty was mandatory for this crime. Pa. Stat. 1794, c. 1777. Virginia followed Pennsylvania's lead and enacted similar legislation. Other States followed suit.

[56] Filler, *supra*, n. 51, at 124.

[57] *Id.*, at 124–125.

[58] Reprinted in 12 Am. J. Legal Hist. 122 (1968).

[59] His advice was in large measure followed. See n. 55, *supra*.

penalty had little immediate impact on the practices of other States.[60] But in the early 1800's, Governors George and DeWitt Clinton and Daniel Tompkins unsuccessfully urged the New York Legislature to modify or end capital punishment. During this same period, Edward Livingston, an American lawyer who later became Secretary of State and Minister to France under President Andrew Jackson, was appointed by the Louisiana Legislature to draft a new penal code. At the center of his proposal was "the total abolition of capital punishment." [61] His Introductory Report to the System of Penal Law Prepared for the State of Louisiana [62] contained a systematic rebuttal of all arguments favoring capital punishment. Drafted in 1824, it was not published until 1833. This work was a tremendous impetus to the abolition movement for the next half century.

During the 1830's, there was a rising tide of sentiment against capital punishment. In 1834, Pennsylvania abolished public executions,[63] and two years later, The Report on Capital Punishment Made to the Maine Legislature was published. It led to a law that prohibited the executive from issuing a warrant for execution within one year after a criminal was sentenced by the courts. The totally discretionary character of the law was at odds with almost all prior practices. The "Maine Law" resulted in little enforcement of the death penalty, which was not surprising since the legislature's idea in passing the law was that the affirmative burden placed on the governor to issue a warrant one full year

[60] One scholar has noted that the early abolition movement in the United States lacked the leadership of major public figures. Bedau, *supra*, n. 45, at 8.

[61] *Ibid.*; Filler, *supra*, n. 51, at 126–127.

[62] See Scott, *supra*, n. 38, at 114–116.

[63] Filler, *supra*, n. 51, at 127.

or more after a trial would be an effective deterrent to exercise of his power.[64] The law spread throughout New England and led to Michigan's being the first State to abolish capital punishment in 1846.[65]

Anti-capital-punishment feeling grew in the 1840's as the literature of the period pointed out the agony of the condemned man and expressed the philosophy that repentance atoned for the worst crimes, and that true repentance derived, not from fear, but from harmony with nature.[66]

By 1850, societies for abolition existed in Massachusetts, New York, Pennsylvania, Tennessee, Ohio, Alabama, Louisiana, Indiana, and Iowa.[67] New York, Massachusetts, and Pennsylvania constantly had abolition bills before their legislatures. In 1852, Rhode Island followed in the footsteps of Michigan and partially abolished capital punishment.[68] Wisconsin totally abolished the death penalty the following year.[69] Those States that did not abolish the death penalty greatly reduced its scope, and "[f]ew states outside the South had more than one or two . . . capital offenses" in addition to treason and murder.[70]

But the Civil War halted much of the abolition furor. One historian has said that "[a]fter the Civil War, men's finer sensibilities, which had once been revolted by the execution of a fellow being, seemed hardened and

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[64] Davis, The Movement to Abolish Capital Punishment in America, 1787–1861, 63 Am. Hist. Rev. 23, 33 (1957).

[65] Filler, *supra*, n. 51, at 128. Capital punishment was abolished for all crimes but treason. The law was enacted in 1846, but did not go into effect until 1847.

[66] Davis, *supra*, n. 64, at 29–30.

[67] Filler, *supra*, n. 51, at 129.

[68] *Id.*, at 130.

[69] *Ibid.*

[70] Bedau, *supra*, n. 45, at 10.

blunted." [71] Some of the attention previously given to abolition was diverted to prison reform. An abolitionist movement still existed, however. Maine abolished the death penalty in 1876, restored it in 1883, and abolished it again in 1887; Iowa abolished capital punishment from 1872–1878; Colorado began an erratic period of *de facto* abolition and revival in 1872; and Kansas also abolished it *de facto* in 1872, and by law in 1907.[72]

One great success of the abolitionist movement in the period from 1830–1900 was almost complete elimination of mandatory capital punishment. Before the legislatures formally gave juries discretion to refrain from imposing the death penalty, the phenomenon of "jury nullification," in which juries refused to convict in cases in which they believed that death was an inappropriate penalty, was experienced.[73] Tennessee was the first State to give juries discretion, Tenn. Laws 1837–1838, c. 29, but other States quickly followed suit. Then, Rep. Curtis of New York introduced a federal bill that ultimately became law in 1897 which reduced the number of federal capital offenses from 60 to 3 (treason, murder, and rape) and gave the jury sentencing discretion in murder and rape cases.[74]

By 1917 12 States had become abolitionist jurisdictions.[75] But, under the nervous tension of World War I,

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[71] Davis, *supra*, n. 64, at 46.

[72] Kansas restored it in 1935. See Appendix I to this opinion, *infra*, at 372.

[73] See *McGautha* v. *California*, 402 U. S., at 199.

[74] Filler, *supra*, n. 51, at 133. See also *Winston* v. *United States*, 172 U. S. 303 (1899). More than 90% of the executions since 1930 in this country have been for offenses with a discretionary death penalty. Bedau, The Courts, the Constitution, and Capital Punishment, 1968 Utah L. Rev. 201, 204.

[75] See n. 72, *supra*.

four of these States reinstituted capital punishment and promising movements in other States came grinding to a halt.[76] During the period following the First World War, the abolitionist movement never regained its momentum.

It is not easy to ascertain why the movement lost its vigor. Certainly, much attention was diverted from penal reform during the economic crisis of the depression and the exhausting years of struggle during World War II. Also, executions, which had once been frequent public spectacles, became infrequent private affairs. The manner of inflicting death changed, and the horrors of the punishment were, therefore, somewhat diminished in the minds of the general public.[77]

In recent years there has been renewed interest in modifying capital punishment. New York has moved toward abolition,[78] as have several other States.[79] In 1967, a bill was introduced in the Senate to abolish

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[76] Filler, *supra*, n. 51, at 134.

[77] Sellin, Executions in the United States, in Capital Punishment 35 (T. Sellin ed. 1967); United Nations, Department of Economic and Social Affairs, Capital Punishment, Pt. II, ¶¶ 82–85, pp. 101–102 (1968).

[78] New York authorizes the death penalty only for murder of a police officer or for murder by a life term prisoner. N. Y. Penal Code § 125.30 (1967).

[79] See generally Bedau, *supra*, n. 74. Nine States do not authorize capital punishment under any circumstances: Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia, and Wisconsin. Puerto Rico and the Virgin Islands also have no provision for capital punishment. Bedau, *supra*, n. 45, at 39. Those States that severely restrict the imposition of the death penalty are: New Mexico, N. M. Stat. Ann. § 40A–29–2.1 (1972); New York, N. Y. Penal Code § 125.30 (1967); North Dakota, N. D. Cent. Code §§ 12–07–01, 12–27–13 (1960); Rhode Island, R. I. Gen. Laws § 11–23–2 (1970); Vermont, Vt. Stat. Ann., Tit. 13, § 2303 (Supp. 1971). California is the only State in which the judiciary has declared capital punishment to be invalid. See n. 1, *supra*.

capital punishment for all federal crimes, but it died in committee.[80]

At the present time, 41 States, the District of Columbia, and other federal jurisdictions authorize the death penalty for at least one crime. It would be fruitless to attempt here to categorize the approach to capital punishment taken by the various States.[81] It is sufficient to note that murder is the crime most often punished by death, followed by kidnaping and treason.[82] Rape is a capital offense in 16 States and the federal system.[83]

The foregoing history demonstrates that capital punishment was carried from Europe to America but, once here, was tempered considerably. At times in our history, strong abolitionist movements have existed. But, they have never been completely successful, as no more than one-quarter of the States of the Union have, at any one time, abolished the death penalty. They have had partial success, however, especially in reducing the number of capital crimes, replacing mandatory death sentences with jury discretion, and developing more humane methods of conducting executions.

This is where our historical foray leads. The question now to be faced is whether American society has

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[80] See generally Hearings on S. 1760 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 2d Sess. (1968).

[81] Extensive compilations of the capital crimes in particular States can be found in Bedau, *supra*, n. 45, at 39–52 and in the Brief for the Petitioner in No. 68–5027, App. G (*Aikens* v. *California*, 406 U. S. 813 (1972)). An attempt is made to break down capital offenses into categories in Finkel, A Survey of Capital Offenses, in Capital Punishment 22 (T. Sellin ed. 1967).

[82] Bedau, *supra*, n. 45, at 43.

[83] *Ibid.* See also *Ralph* v. *Warden*, 438 F. 2d 786, 791–792 (CA4 1970).

reached a point where abolition is not dependent on a successful grass roots movement in particular jurisdictions, but is demanded by the Eighth Amendment. To answer this question, we must first examine whether or not the death penalty is today tantamount to excessive punishment.

V

In order to assess whether or not death is an excessive or unnecessary penalty, it is necessary to consider the reasons why a legislature might select it as punishment for one or more offenses, and examine whether less severe penalties would satisfy the legitimate legislative wants as well as capital punishment. If they would, then the death penalty is unnecessary cruelty, and, therefore, unconstitutional.

There are six purposes conceivably served by capital punishment: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy. These are considered *seriatim* below.

A. The concept of retribution is one of the most misunderstood in all of our criminal jurisprudence. The principal source of confusion derives from the fact that, in dealing with the concept, most people confuse the question "why do men in fact punish?" with the question "what justifies men in punishing?" [84] Men may punish for any number of reasons, but the one reason that punishment is morally good or morally justifiable is that someone has broken the law. Thus, it can correctly be said that breaking the law is the *sine qua non* of punishment, or, in other words, that we only

[84] See Hart, Murder and the Principles of Punishment: England and the United States, 52 Nw. U. L. Rev. 433, 448 (1957); Report of Royal Commission on Capital Punishment, 1949–1953, Cmd. 8932, ¶¶ 52–53, pp. 17–18 (1953). See generally, Reichert, Capital Punishment Reconsidered, 47 Ky. L. J. 397, 399 (1959).

tolerate punishment as it is imposed on one who deviates from the norm established by the criminal law.

The fact that the State may seek retribution against those who have broken its laws does not mean that retribution may then become the State's sole end in punishing. Our jurisprudence has always accepted deterrence in general, deterrence of individual recidivism, isolation of dangerous persons, and rehabilitation as proper goals of punishment. See *Trop* v. *Dulles*, 356 U. S., at 111 (BRENNAN, J., concurring). Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society.

Punishment as retribution has been condemned by scholars for centuries,[85] and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance.

In *Weems* v. *United States*, 217 U. S., at 381, the Court, in the course of holding that Weems' punishment violated the Eighth Amendment, contrasted it with penalties provided for other offenses and concluded:

> "[T]his contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice. The State thereby suffers nothing and loses no power. *The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal.*" (Emphasis added.)

[85] See, *e. g.*, C. Beccaria, On Crimes and Punishment (tr. by H. Paolucci 1963); 1 Archbold, On the Practice, Pleading, and Evidence in Criminal Cases §§ 11–17, pp. XV–XIX (T. Waterman 7th ed. 1860).

It is plain that the view of the *Weems* Court was that punishment for the sake of retribution was not permissible under the Eighth Amendment. This is the only view that the Court could have taken if the "cruel and unusual" language were to be given any meaning. Retribution surely underlies the imposition of some punishment on one who commits a criminal act. But, the fact that *some* punishment may be imposed does not mean that *any* punishment is permissible. If retribution alone could serve as a justification for any particular penalty, then all penalties selected by the legislature would by definition be acceptable means for designating society's moral approbation of a particular act. The "cruel and unusual" language would thus be read out of the Constitution and the fears of Patrick Henry and the other Founding Fathers would become realities.

To preserve the integrity of the Eighth Amendment, the Court has consistently denigrated retribution as a permissible goal of punishment.[86] It is undoubtedly correct that there is a demand for vengeance on the part of many persons in a community against one who is convicted of a particularly offensive act. At times a cry is heard that morality requires vengeance to evi-

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[86] See, *e. g.*, *Rudolph* v. *Alabama*, 375 U. S. 889 (1963) (Goldberg, J., dissenting from denial of certiorari); *Trop* v. *Dulles*, 356 U. S., at 97 (Warren, C. J.), 113 (BRENNAN, J., concurring); *Morissette* v. *United States*, 342 U. S. 246 (1952); *Williams* v. *New York*, 337 U. S. 241 (1949). In *Powell* v. *Texas*, 392 U. S., at 530, we said: "This Court has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects . . . ." This is, of course, correct, since deterrence and isolation are clearly recognized as proper. *E. g.*, *Trop* v. *Dulles*, *supra*, at 111 (BRENNAN, J., concurring). There is absolutely nothing in the language, the rationale, or the holding of *Powell* v. *Texas* that implies that retribution for its own sake is a proper legislative aim in punishing.

dence society's abhorrence of the act.[87] But the Eighth Amendment is our insulation from our baser selves. The "cruel and unusual" language limits the avenues through which vengeance can be channeled. Were this not so, the language would be empty and a return to the rack and other tortures would be possible in a given case.

Mr. Justice Story wrote that the Eighth Amendment's limitation on punishment "would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct." [88]

I would reach an opposite conclusion—that only in a free society would men recognize their inherent weaknesses and seek to compensate for them by means of a Constitution.

The history of the Eighth Amendment supports only the conclusion that retribution for its own sake is improper.

B. The most hotly contested issue regarding capital punishment is whether it is better than life imprisonment as a deterrent to crime.[89]

While the contrary position has been argued,[90] it is my firm opinion that the death penalty is a more severe sanction than life imprisonment. Admittedly, there are

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[87] See, *e. g.*, Vellenga, Christianity and The Death Penalty, in Bedau, *supra*, n. 45, at 123–130; Hook, The Death Sentence, in Bedau, *supra*, at 146–154. See also Ehrenzweig, A Psychoanalysis of the Insanity Plea—Clues to the Problems of Criminal Responsibility and Insanity in the Death Cell, 73 Yale L. J. 425, 433–439 (1964).

[88] 2 J. Story, On the Constitution § 1903, p. 650 (5th ed. 1891).

[89] Note, The Death Penalty Cases, 56 Calif. L. Rev. 1268, 1275 (1968); Note, Justice or Revenge?, 60 Dick. L. Rev. 342, 343 (1956); Royal Commission, *supra*, n. 84, ¶ 55, at 18.

[90] Barzun, In Favor of Capital Punishment, in Bedau, *supra*, n. 45, at 154, 163; Hook, *supra*, n. 87, at 152.

some persons who would rather die than languish in prison for a lifetime. But, whether or not they should be able to choose death as an alternative is a far different question from that presented here—*i. e.*, whether the State can impose death as a punishment. Death is irrevocable; life imprisonment is not. Death, of course, makes rehabilitation impossible; life imprisonment does not. In short, death has always been viewed as the ultimate sanction, and it seems perfectly reasonable to continue to view it as such.[91]

It must be kept in mind, then, that the question to be considered is not simply whether capital punishment is

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[91] See *Commonwealth* v. *Elliott*, 371 Pa. 70, 78, 89 A. 2d 782, 786 (1952) (Musmanno, J., dissenting); F. Frankfurter, Of Law and Men 101 (1956). The assertion that life imprisonment may somehow be more cruel than death is usually rejected as frivolous. Hence, I confess to surprise at finding the assertion being made in various ways in today's opinions. If there were any merit to the contention, it would do much to undercut even the retributive motive for imposing capital punishment. In any event, there is no better response to such an assertion than that of former Pennsylvania Supreme Court Justice Musmanno in his dissent in *Commonwealth* v. *Elliott*, *supra*, at 79–80, 89 A. 2d, at 787:

"One of the judges of the lower court indicated from the bench that a sentence of life imprisonment is not to be regarded as a lesser penalty than that of death. I challenge that statement categorically. It can be stated as a universal truth stretching from nadir to zenith that regardless of circumstances, no one wants to die. Some person may, in an instant of spiritual or physical agony express a desire for death as an anodyne from intolerable pain, but that desire is never full-hearted because there is always the reserve of realization that the silken cord of life is not broken by a mere wishing. There is no person in the actual extremity of dropping from the precipice of life who does not desperately reach for a crag of time to which to cling even for a moment against the awful eternity of silence below. With all its 'slings and arrows of outrageous fortune,' life is yet sweet and death is always cruel."

Attention should also be given to the hypothesis of Sir James Stephen, quoted in the text, *infra*, at 347–348.

a deterrent, but whether it is a better deterrent than life imprisonment.[92]

There is no more complex problem than determining the deterrent efficacy of the death penalty. "Capital punishment has obviously failed as a deterrent when a murder is committed. We can number its failures. But we cannot number its successes. No one can ever know how many people have refrained from murder because of the fear of being hanged." [93] This is the nub of the problem and it is exacerbated by the paucity of useful data. The United States is more fortunate than most countries, however, in that it has what are generally considered to be the world's most reliable statistics.[94]

The two strongest arguments in favor of capital punishment as a deterrent are both logical hypotheses devoid of evidentiary support, but persuasive nonetheless. The first proposition was best stated by Sir James Stephen in 1864:

> "No other punishment deters men so effectually from committing crimes as the punishment of death. This is one of those propositions which it is difficult to prove, simply because they are in themselves more obvious than any proof can make them. It is possible to display ingenuity in arguing against it, but that is all. The whole experience of mankind is in the other direction. The threat of instant death is the one to which resort has always been made when there was an absolute necessity for producing some result. . . . No one goes to certain

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[92] See Bedau, Deterrence and the Death Penalty: A Reconsideration, 61 J. Crim. L. C. & P. S. 539, 542 (1970).

[93] Royal Commission, *supra*, n. 84, ¶ 59, at 20.

[94] United Nations, *supra*, n. 77, ¶ 134, at 117. The great advantage that this country has is that it can compare abolitionist and retentionist States with geographic, economic, and cultural similarities.

> inevitable death except by compulsion. Put the matter the other way. Was there ever yet a criminal who, when sentenced to death and brought out to die, would refuse the offer of a commutation of his sentence for the severest secondary punishment? Surely not. Why is this? It can only be because 'All that a man has will he give for his life.' In any secondary punishment, however terrible, there is hope; but death is death; its terrors cannot be described more forcibly." [95]

This hypothesis relates to the use of capital punishment as a deterrent for any crime. The second proposition is that "if life imprisonment is the maximum penalty for a crime such as murder, an offender who is serving a life sentence cannot then be deterred from murdering a fellow inmate or a prison officer." [96] This hypothesis advocates a limited deterrent effect under particular circumstances.

Abolitionists attempt to disprove these hypotheses by amassing statistical evidence to demonstrate that there is no correlation between criminal activity and the existence or nonexistence of a capital sanction. Almost all of the evidence involves the crime of murder, since murder is punishable by death in more jurisdictions than are other offenses,[97] and almost 90% of all executions since 1930 have been pursuant to murder convictions.[98]

Thorsten Sellin, one of the leading authorities on capital punishment, has urged that if the death penalty

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[95] Reprinted in Royal Commission, *supra*, n. 84, ¶ 57, at 19.

[96] United Nations, *supra*, n. 77, ¶ 139, at 118.

[97] See Bedau, *supra*, n. 45, at 43.

[98] T. Sellin, The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute (ALI) 5 (1959); Morris, Thoughts on Capital Punishment, 35 Wash. L. Rev. & St. Bar J. 335, 340 (1960).

deters prospective murderers, the following hypotheses should be true:

> "(a) Murders should be less frequent in states that have the death penalty than in those that have abolished it, other factors being equal. Comparisons of this nature must be made among states that are as alike as possible in all other respects—character of population, social and economic condition, etc.—in order not to introduce factors known to influence murder rates in a serious manner but present in only one of these states.
>
> "(b) Murders should increase when the death penalty is abolished and should decline when it is restored.
>
> "(c) The deterrent effect should be greatest and should therefore affect murder rates most powerfully in those communities where the crime occurred and its consequences are most strongly brought home to the population.
>
> "(d) Law enforcement officers would be safer from murderous attacks in states that have the death penalty than in those without it." [99] (Footnote omitted.)

Sellin's evidence indicates that not one of these propositions is true. This evidence has its problems, however. One is that there are no accurate figures for capital murders; there are only figures on homicides and they, of course, include noncapital killings.[100] A second problem is that certain murders undoubtedly are misinterpreted as accidental deaths or suicides, and there

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[99] Sellin, *supra*, n. 98, at 21.

[100] Such crimes might include lesser forms of homicide or homicide by a child or a lunatic. *Id.*, at 22; The Laws, The Crimes, and The Executions, in Bedau, *supra*, n. 45, at 32, 61.

is no way of estimating the number of such undetected crimes. A third problem is that not all homicides are reported. Despite these difficulties, most authorities have assumed that the proportion of capital murders in a State's or nation's homicide statistics remains reasonably constant,[101] and that the homicide statistics are therefore useful.

Sellin's statistics demonstrate that there is no correlation between the murder rate and the presence or absence of the capital sanction. He compares States that have similar characteristics and finds that irrespective of their position on capital punishment, they have similar murder rates. In the New England States, for example, there is no correlation between executions [102] and homicide rates.[103] The same is true for Midwestern States,[104] and for all others studied. Both the United Nations [105] and Great Britain [106] have acknowledged the validity of Sellin's statistics.

Sellin also concludes that abolition and/or reintroduction of the death penalty had no effect on the homicide rates of the various States involved.[107] This conclusion is borne out by others who have made similar

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[101] Sutherland, Murder and the Death Penalty, 15 J. Crim. L. & Crim. 522 (1925); ALI, *supra*, n. 98, at 22; Bedau, *supra*, n. 45, at 73.

[102] Executions were chosen for purposes of comparison because whatever impact capital punishment had would surely be most forcefully felt where punishment was actually imposed.

[103] See Appendix II to this opinion, *infra*, at 373.

[104] See Appendix III to this opinion, *infra*, at 374.

[105] United Nations, *supra*, n. 77, ¶ 134, at 117.

[106] Royal Commission, *supra*, n. 84, at 349–351. Accord, Vold, Extent and Trend of Capital Crimes in United States, 284 Annals Am. Acad. Pol. & Soc. Sci. 1, 4 (1952).

[107] Sellin, *supra*, n. 98, at 34.

inquiries [108] and by the experience of other countries.[109] Despite problems with the statistics,[110] Sellin's evidence has been relied upon in international studies of capital punishment.[111]

Statistics also show that the deterrent effect of capital punishment is no greater in those communities where executions take place than in other communities.[112] In fact, there is some evidence that imposition of capital punishment may actually encourage crime, rather than deter it.[113] And, while police and law enforcement offi-

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[108] See, *e. g.*, Guillot, Abolition and Restoration of the Death Penalty in Missouri, in Bedau, *supra*, n. 45, at 351, 358–359; Cobin, Abolition and Restoration of the Death Penalty in Delaware, in Bedau, *supra*, at 359, 371–372.

[109] Sellin, *supra*, n. 98, at 38–39; Royal Commission, *supra*, n. 84, at 353; United Nations, *supra*, n. 77, ¶¶ 130–136, at 116–118.

[110] One problem is that the statistics for the 19th century are especially suspect; another is that *de jure* abolition may have been preceded by *de facto* abolition which would have distorted the figures. It should also be noted that the figures for several States reflect homicide convictions rather than homicide rates.

[111] Royal Commission, *supra*, n. 84, ¶ 65, at 23; 346–349; United Nations, *supra*, n. 77, ¶ 132, at 117.

[112] Hayner & Cranor, The Death Penalty in Washington State, 284 Annals Am. Acad. Pol. & Soc. Sci. 101 (1952); Graves, A Doctor Looks at Capital Punishment, 10 Med. Arts & Sci 137 (1956); Dann, The Deterrent Effect of Capital Punishment, Bull. 29, Friends Social Service Series, Committee on Philanthropic Labor and Philadelphia Yearly Meeting of Friends (1935); Savitz, A Study in Capital Punishment, 49 J. Crim. L. C. & P. S. 338 (1958); United Nations, *supra*, n. 77, ¶ 135, at 118.

[113] Graves, *supra*, n. 112; Hearings, *supra*, n. 80, at 23 (testimony of C. Duffy), 126 (statement of Dr. West); T. Reik, The Compulsion to Confess 474 (1959); McCafferty, Major Trends in the Use of Capital Punishment, 25 Fed. Prob., No. 3, p. 15 (Sept. 1961). Capital punishment may provide an outlet for suicidal impulses or a means of achieving notoriety, for example.

cers are the strongest advocates of capital punishment,[114] the evidence is overwhelming that police are no safer in communities that retain the sanction than in those that have abolished it.[115]

There is also a substantial body of data showing that the existence of the death penalty has virtually no effect on the homicide rate in prisons.[116] Most of the persons sentenced to death are murderers, and murderers tend to be model prisoners.[117]

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[114] See, *e. g.*, Gerstein, A Prosecutor Looks at Capital Punishment, 51 J. Crim. L. C. & P. S. 252 (1960); Hoover, Statements in Favor of the Death Penalty, in Bedau, *supra*, n. 45, at 130; Younger, Capital Punishment: A Sharp Medicine Reconsidered, 42 A. B. A. J. 113 (1956). But see, Symposium on Capital Punishment, District Attorneys' Assn. of State of New York, Jan. 27, 1961, 7 N. Y. L. F. 249, 267 (1961) (statement of A. Herman, head of the homicide bureau of the New York City District Attorney's office).

[115] Sellin, *supra*, n. 98, at 56–58; Koeninger, Capital Punishment in Texas, 1924–1968, 15 Crime & Delin. 132 (1969); Sellin, Does the Death Penalty Protect Municipal Police, in Bedau, *supra*, n. 45, at 284; United Nations, *supra*, n. 77, ¶ 136, at 118.

[116] L. Lawes, Life and Death in Sing Sing 150 (1928); McGee, Capital Punishment as Seen by a Correctional Administrator, 28 Fed. Prob., No. 2, p. 11 (June 1964); 1950 Survey of the International Penal and Penitentiary Commission, cited in Sellin, *supra*, n. 98, at 70–72; Sellin, Prisons Homicides, in Capital Punishment 154 (T. Sellin ed. 1967); cf. Akman, Homicides and Assaults in Canadian Prisons, in Capital Punishment, *supra*, at 161–168. The argument can be made that the reason for the good record of murderers is that those who are likely to be recidivists are executed. There is, however, no evidence to show that in choosing between life and death sentences juries select the lesser penalties for those persons they believe are unlikely to commit future crimes.

[117] *E. g.*, United Nations, *supra*, n. 77, ¶ 144, at 119; B. Eshelman & F. Riley, Death Row Chaplain 224 (1962). This is supported also by overwhelming statistics showing an extremely low rate of recidivism for convicted murderers who are released from prison. Royal Commission, *supra*, n. 84, App. 15, at 486–491; Sellin, *supra*, n. 98, at 72–79; United Nations, *supra*, n. 77, ¶ 144, at 119.

In sum, the only support for the theory that capital punishment is an effective deterrent is found in the hypotheses with which we began and the occasional stories about a specific individual being deterred from doing a contemplated criminal act.[118] These claims of specific deterrence are often spurious,[119] however, and may be more than counterbalanced by the tendency of capital punishment to incite certain crimes.[120]

The United Nations Committee that studied capital punishment found that "[i]t is generally agreed between the retentionists and abolitionists, whatever their opinions about the validity of comparative studies of deterrence, that the data which now exist show no correlation between the existence of capital punishment and lower rates of capital crime." [121]

Despite the fact that abolitionists have not proved non-deterrence beyond a reasonable doubt, they have succeeded in showing by clear and convincing evidence that capital punishment is not necessary as a deterrent to crime in our society. This is all that they must do. We would shirk our judicial responsibilities if we failed to accept the presently existing statistics and demanded more proof. It may be that we now possess all the proof that anyone could ever hope to assemble on the subject. But, even if further proof were to be forthcoming, I believe there is more than enough evidence presently available for a decision in this case.

In 1793 William Bradford studied the utility of the death penalty in Pennsylvania and found that it probably had no deterrent effect but that more evidence

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[118] See, *e. g.*, The Question of Deterrence, in Bedau, *supra*, n. 45, at 267.

[119] *Ibid.* and n. 11; Note, The Death Penalty Cases, 56 Calif. L. Rev. 1268, 1282–1283 (1968).

[120] See n. 113, *supra*.

[121] United Nations, *supra*, n. 77, ¶ 159, at 123.

was needed.[122] Edward Livingston reached a similiar conclusion with respect to deterrence in 1833 upon completion of his study for Louisiana.[123] Virtually every study that has since been undertaken has reached the same result.[124]

In light of the massive amount of evidence before us, I see no alternative but to conclude that capital punishment cannot be justified on the basis of its deterrent effect.[125]

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[122] See nn. 58 and 59, *supra*, and accompanying text.

[123] See n. 62, *supra*, and accompanying text.

[124] Graves, A Doctor Looks at Capital Punishment, 10 Med. Arts. & Sci. 137 (1956); Royal Commission, *supra*, n. 84, ¶ 60, at 20–21; Schuessler, The Deterrent Influence of the Death Penalty, 284 Annals Am. Acad. Pol. & Soc. Sci. 54 (1952); United Nations, *supra*, n. 77, ¶ 142, at 119; M. Wolfgang, Patterns in Criminal Homicide (1958).

One would assume that if deterrence were enhanced by capital punishment, the increased deterrence would be most effective with respect to the premeditating murderer or the hired killer who plots his crime before committing it. But, such people rarely expect to be caught and usually assume that if they are caught they will either be acquitted or sentenced to prison. This is a fairly dependable assumption since a reliable estimate is that one person is executed for every 100 capital murders known to the police. Hart, Murder and the Principles of Punishment: England and the United States, 52 Nw. U. L. Rev. 433, 444–445 (1957). For capital punishment to deter anybody it must be a certain result of a criminal act, cf. *Ex parte Medley*, 134 U. S. 160 (1890), and it is not. It must also follow swiftly upon completion of the offense and it cannot in our complicated due process system of justice. See, *e. g.*, The Question of Deterrence, in Bedau, *supra*, n. 45, at 258, 271–272; DiSalle, Trends in the Abolition of Capital Punishment, 1969 U. Toledo L. Rev. 1, 4. It is ironic that those persons whom we would like to deter the most have the least to fear from the death penalty and recognize that fact. Sellin, Address for Canadian Society for Abolition of the Death Penalty, Feb. 7, 1965, in 8 Crim. L. Q. 36, 48 (1966); Proceedings of the Section of Criminal Law of the ABA, Aug. 24, 1959, p. 7 (M. DiSalle).

[125] In reaching this conclusion, I maintain agreement with that portion of Stephen's hypothesis that suggests that convicted crim-

C. Much of what must be said about the death penalty as a device to prevent recidivism is obvious—if a murderer is executed, he cannot possibly commit another offense. The fact is, however, that murderers are extremely unlikely to commit other crimes either in prison or upon their release.[126] For the most part, they are first offenders, and when released from prison they are known to become model citizens.[127] Furthermore, most persons who commit capital crimes are not executed. With respect to those who are sentenced to die, it is critical to note that the jury is never asked to determine whether they are likely to be recidivists. In light of these facts, if capital punishment were justified purely on the basis of preventing recidivism, it would have to be considered to be excessive; no general need to obliterate all capital offenders could have been demonstrated, nor any specific need in individual cases.

D. The three final purposes which may underlie utilization of a capital sanction—encouraging guilty pleas and confessions, eugenics, and reducing state expenditures—may be dealt with quickly. If the death penalty is used to encourage guilty pleas and thus to deter suspects from exercising their rights under the Sixth Amendment to jury trials, it is unconstitutional. *United States*

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inals fear death more than they fear life imprisonment. As I stated earlier, the death penalty is a more severe sanction. The error in the hypothesis lies in its assumption that because men fear death more than imprisonment after they are convicted, they necessarily must weigh potential penalties prior to committing criminal acts and that they will conform their behavior so as to insure that, if caught, they will receive the lesser penalty. It is extremely unlikely that much thought is given to penalties before the act is committed, and even if it were, the preceding footnote explains why such thought would not lead to deterrence.

[126] See n. 117, *supra*.

[127] See, *e. g.*, Royal Commission, *supra*, n. 84, App. 15, at 486–491.

v. *Jackson*, 390 U. S. 570 (1968).[128] Its elimination would do little to impair the State's bargaining position in criminal cases, since life imprisonment remains a severe sanction which can be used as leverage for bargaining for pleas or confessions in exchange either for charges of lesser offenses or recommendations of leniency.

Moreover, to the extent that capital punishment is used to encourage confessions and guilty pleas, it is not being used for punishment purposes. A State that justifies capital punishment on its utility as part of the conviction process could not profess to rely on capital punishment as a deterrent. Such a State's system would be structured with twin goals only: obtaining guilty pleas and confessions and imposing *imprisonment* as the maximum sanction. Since life imprisonment is sufficient for bargaining purposes, the death penalty is excessive if used for the same purposes.

In light of the previous discussion on deterrence, any suggestions concerning the eugenic benefits of capital punishment are obviously meritless.[129] As I pointed out above, there is not even any attempt made to discover which capital offenders are likely to be recidivists, let alone which are positively incurable. No test or procedure presently exists by which incurables can be screened from those who would benefit from treatment. On the one hand, due process would seem to require that we have some procedure to demonstrate incurability before execution; and, on the other hand, equal protection would then seemingly require that all incurables be executed, cf. *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942). In addition, the "cruel and unusual" language

[128] *Jackson* applies to the States under the criteria articulated in *Duncan* v. *Louisiana*, 391 U. S. 145, 149 (1968).

[129] See, *e. g.*, Barzun, In Favor of Capital Punishment, in Bedau, *supra*, n. 45, at 154.

would require that life imprisonment, treatment, and sterilization be inadequate for eugenic purposes. More importantly, this Nation has never formally professed eugenic goals, and the history of the world does not look kindly on them. If eugenics is one of our purposes, then the legislatures should say so forthrightly and design procedures to serve this goal. Until such time, I can only conclude, as has virtually everyone else who has looked at the problem,[130] that capital punishment cannot be defended on the basis of any eugenic purposes.

As for the argument that it is cheaper to execute a capital offender than to imprison him for life, even assuming that such an argument, if true, would support a capital sanction, it is simply incorrect. A disproportionate amount of money spent on prisons is attributable to death row.[131] Condemned men are not productive members of the prison community, although they could be,[132] and executions are expensive.[133] Appeals are often automatic, and courts admittedly spend more time with death cases.[134]

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[130] See, *e. g.*, Death as a Punishment, in Bedau, *supra*, at 214, 226–228; Caldwell, Why is the Death Penalty Retained?, 284 Annals Am. Acad. Pol. & Soc. Sci. 45, 50 (1952); Johnson, Selective Factors in Capital Punishment, 36 Social Forces 165, 169 (1957); Sellin, Capital Punishment, 25 Fed. Prob., No. 3, p. 3 (Sept. 1961). We should not be surprised at the lack of merit in the eugenic arguments. There simply is no evidence that mentally ill persons who commit capital offenses constitute a psychiatric entity distinct from other mentally disordered patients or that they do not respond as readily to treatment. Cruvant & Waldrop, The Murderer in the Mental Institution, 284 Annals Am. Acad. Pol. & Soc. Sci. 35, 43 (1952).

[131] Caldwell, *supra*, n. 130, at 48; McGee, *supra*, n. 116.

[132] McGee, *supra*, at 13–14; Bailey, Rehabilitation on Death Row, in Bedau, *supra*, n. 45, at 556.

[133] T. Thomas, This Life We Take 20 (3d ed. 1965).

[134] *Stein* v. *New York*, 346 U. S. 156, 196 (1953) (Jackson, J.); cf. *Reid* v. *Covert*, 354 U. S. 1, 77 (1957) (Harlan, J., concurring in result).

At trial, the selection of jurors is likely to become a costly, time-consuming problem in a capital case,[135] and defense counsel will reasonably exhaust every possible means to save his client from execution, no matter how long the trial takes.

During the period between conviction and execution, there are an inordinate number of collateral attacks on the conviction and attempts to obtain executive clemency, all of which exhaust the time, money, and effort of the State. There are also continual assertions that the condemned prisoner has gone insane.[136] Because there is a formally established policy of not executing insane persons,[137] great sums of money may be spent on detecting and curing mental illness in order to perform the execution.[138] Since no one wants the responsibility for the execution, the condemned man is likely to be passed back and forth from doctors to custodial officials to courts like a ping-pong ball.[139] The entire process is very costly.

When all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life.[140]

E. There is but one conclusion that can be drawn from all of this—*i. e.*, the death penalty is an excessive and unnecessary punishment that violates the Eighth

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[135] See, *e. g.*, *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968).

[136] Slovenko, And the Penalty is (Sometimes) Death, 24 Antioch Review 351 (1964).

[137] See, *e. g.*, *Caritativo* v. *California*, 357 U. S. 549 (1958).

[138] To others, as well as to the author of this opinion, this practice has seemed a strange way to spend money. See, *e. g.*, T. Arnold, The Symbols of Government 10–13 (1935).

[139] Slovenko, *supra*, n. 136, at 363.

[140] B. Eshelman & F. Riley, Death Row Chaplain 226 (1962); Caldwell, *supra*, n. 130, at 48; McGee, *supra*, n. 116, at 13; Sellin, *supra*, n. 130, at 3 (Sept. 1961).

Amendment. The statistical evidence is not convincing beyond all doubt, but it is persuasive. It is not improper at this point to take judicial notice of the fact that for more than 200 years men have labored to demonstrate that capital punishment serves no purpose that life imprisonment could not serve equally well. And they have done so with great success. Little, if any, evidence has been adduced to prove the contrary. The point has now been reached at which deference to the legislatures is tantamount to abdication of our judicial roles as factfinders, judges, and ultimate arbiters of the Constitution. We know that at some point the presumption of constitutionality accorded legislative acts gives way to a realistic assessment of those acts. This point comes when there is sufficient evidence available so that judges can determine, not whether the legislature acted wisely, but whether it had any rational basis whatsoever for acting. We have this evidence before us now. There is no rational basis for concluding that capital punishment is not excessive. It therefore violates the Eighth Amendment.[141]

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[141] This analysis parallels in some ways the analysis used in striking down legislation on the ground that it violates Fourteenth Amendment concepts of substantive due process. See Packer, Making the Punishment Fit the Crime, 77 Harv. L. Rev. 1071, 1074 (1964). There is one difference, however. Capital punishment is unconstitutional because it is excessive and unnecessary punishment, not because it is irrational.

The concepts of cruel and unusual punishment and substantive due process become so close as to merge when the substantive due process argument is stated in the following manner: because capital punishment deprives an individual of a fundamental right (*i. e.*, the right to life), *Johnson* v. *Zerbst*, 304 U. S. 458, 462 (1938), the State needs a compelling interest to justify it. See Note, The Death Penalty Cases, 56 Calif. L. Rev. 1268, 1324–1354 (1968). Thus stated, the substantive due process argument reiterates what is essentially the primary purpose of the Cruel and Unusual Punishments

VI

In addition, even if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history.

In judging whether or not a given penalty is morally acceptable, most courts have said that the punishment is valid unless "it shocks the conscience and sense of justice of the people." [142]

Clause of the Eighth Amendment—*i. e.*, punishment may not be more severe than is necessary to serve the legitimate interests of the State.

THE CHIEF JUSTICE asserts that if we hold that capital punishment is unconstitutional because it is excessive, we will next have to determine whether a 10-year prison sentence rather than a five-year sentence is also excessive, or whether a $5 fine would not do equally well as a $10 fine. He may be correct that such determinations will have to be made, but, as in these cases, those persons challenging the penalty will bear a heavy burden of demonstrating that it is excessive. These cases arise after 200 years of inquiry, 200 years of public debate and 200 years of marshaling evidence. The burden placed on those challenging capital punishment could not have been greater. I am convinced that they have met their burden. Whether a similar burden will prove too great in future cases is a question that we can resolve in time.

[142] *United States* v. *Rosenberg*, 195 F. 2d 583, 608 (CA2) (Frank, J.), cert. denied, 344 U. S. 838 (1952). See also *Kasper* v. *Brittain*, 245 F. 2d 92, 96 (CA6), cert. denied, 355 U. S. 834 (1957) ("shocking to the sense of justice"); *People* v. *Morris*, 80 Mich. 634, 639, 45 N. W. 591, 592 (1890) ("shock the moral sense of the people"). In *Repouille* v. *United States*, 165 F. 2d 152 (CA2 1947), and *Schmidt* v. *United States*, 177 F. 2d 450, 451 (CA2 1949), Judge Learned Hand wrote that the standard of "good moral character" in the Nationality Act was to be judged by "the generally accepted moral conventions current at the time." 165 F. 2d, at 153. Judge Frank, who was later to author the *Rosenberg* opinion, in which a similar standard was adopted, dissented in *Repouille* and urged that the correct standard was the "attitude of our ethical leaders." 165 F. 2d, at 154. In light of *Rosenberg*, it is apparent that Judge Frank would require a much broader based moral approbation before strik-

Judge Frank once noted the problems inherent in the use of such a measuring stick:

> "[The court,] before it reduces a sentence as 'cruel and unusual,' must have reasonably good assurances that the sentence offends the 'common conscience.' And, in any context, such a standard—the community's attitude—is usually an unknowable. It resembles a slithery shadow, since one can seldom learn, at all accurately, what the community, or a majority, actually feels. Even a carefully-taken 'public opinion poll' would be inconclusive in a case like this." [143]

While a public opinion poll obviously is of some assistance in indicating public acceptance or rejection of a specific penalty,[144] its utility cannot be very great. This is because whether or not a punishment is cruel and unusual depends, not on whether its mere mention "shocks the conscience and sense of justice of the people," but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable.[145]

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ing down a punishment as cruel and unusual than he would for merely holding that conduct was evidence of bad moral character under a legislative act.

[143] *United States* v. *Rosenberg*, *supra*, at 608.

[144] See *Repouille* v. *United States*, *supra*, at 153. In *Witherspoon* v. *Illinois*, 391 U. S., at 520, the Court cited a public opinion poll that showed that 42% of the American people favored capital punishment, while 47% opposed it. But the polls have shown great fluctuation. See What Do Americans Think of the Death Penalty?, in Bedau, *supra*, n. 45, at 231–241.

[145] The fact that the constitutionality of capital punishment turns on the opinion of an informed citizenry undercuts the argument that since the legislature is the voice of the people, its retention of capital punishment must represent the will of the people. So few people have been executed in the past decade that capital punishment is

In other words, the question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available.

This is not to suggest that with respect to this test of unconstitutionality people are required to act rationally; they are not. With respect to this judgment, a violation of the Eighth Amendment is totally dependent on the predictable subjective, emotional reactions of informed citizens.[146]

It has often been noted that American citizens know almost nothing about capital punishment.[147] Some of the conclusions arrived at in the preceding section and the supporting evidence would be critical to an informed judgment on the morality of the death penalty: *e. g.*, that the death penalty is no more effective a deterrent than life imprisonment, that convicted murderers are

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a subject only rarely brought to the attention of the average American. Lack of exposure to the problem is likely to lead to indifference, and indifference and ignorance result in preservation of the status quo, whether or not that is desirable, or desired.

It might be argued that in choosing to remain indifferent and uninformed, citizens reflect their judgment that capital punishment is really a question of utility, not morality, and not one, therefore, of great concern. As attractive as this is on its face, it cannot be correct, because such an argument requires that the choice to remain ignorant or indifferent be a viable one. That, in turn, requires that it be a knowledgeable choice. It is therefore imperative for constitutional purposes to attempt to discern the probable opinion of an informed electorate.

[146] Cf. Packer, Making the Punishment Fit the Crime, 77 Harv. L. Rev. 1071, 1076 (1964).

[147] *E. g.*, Gold, A Psychiatric Review of Capital Punishment, 6 J. Forensic Sci. 465, 466 (1961); A. Koestler, Reflections on Hanging 164 (1957); cf. C. Duffy & A. Hirshberg, 88 Men and 2 Women 257–258 (1962).

rarely executed, but are usually sentenced to a term in prison; that convicted murderers usually are model prisoners, and that they almost always become law-abiding citizens upon their release from prison; that the costs of executing a capital offender exceed the costs of imprisoning him for life; that while in prison, a convict under sentence of death performs none of the useful functions that life prisoners perform; that no attempt is made in the sentencing process to ferret out likely recidivists for execution; and that the death penalty may actually stimulate criminal activity.

This information would almost surely convince the average citizen that the death penalty was unwise, but a problem arises as to whether it would convince him that the penalty was morally reprehensible. This problem arises from the fact that the public's desire for retribution, even though this is a goal that the legislature cannot constitutionally pursue as its sole justification for capital punishment, might influence the citizenry's view of the morality of capital punishment. The solution to the problem lies in the fact that no one has ever seriously advanced retribution as a legitimate goal of our society. Defenses of capital punishment are always mounted on deterrent or other similar theories. This should not be surprising. It is the people of this country who have urged in the past that prisons rehabilitate as well as isolate offenders, and it is the people who have injected a sense of purpose into our penology. I cannot believe that at this stage in our history, the American people would ever knowingly support purposeless vengeance. Thus, I believe that the great mass of citizens would conclude on the basis of the material already considered that the death penalty is immoral and therefore unconstitutional.

But, if this information needs supplementing, I believe that the following facts would serve to convince

even the most hesitant of citizens to condemn death as a sanction: capital punishment is imposed discriminatorily against certain identifiable classes of people; there is evidence that innocent people have been executed before their innocence can be proved; and the death penalty wreaks havoc with our entire criminal justice system. Each of these facts is considered briefly below.

Regarding discrimination, it has been said that "[i]t is usually the poor, the illiterate, the underprivileged, the member of the minority group—the man who, because he is without means, and is defended by a court-appointed attorney—who becomes society's sacrificial lamb . . . ." [148] Indeed, a look at the bare statistics regarding executions is enough to betray much of the discrimination. A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro.[149] Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white and 1,630 were Negro; [150] 455 persons, including 48 whites and 405 Negroes, were executed for rape.[151] It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination.[152]

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[148] Hearings, *supra*, n. 80, at 11 (statement of M. DiSalle).

[149] National Prisoner Statistics No. 45, Capital Punishment 1930–1968, p. 7 (Aug. 1969).

[150] *Ibid.*

[151] *Ibid.*

[152] Alexander, The Abolition of Capital Punishment, Proceedings of the 96th Congress of Correction of the American Correctional Association, Baltimore, Md., 57 (1966); Criminal Justice: The General Aspects, in Bedau, *supra*, n. 45, at 405, 411–414; Bedau, Death Sentences in New Jersey, 1907–1960, 19 Rutgers L. Rev. 1,

Racial or other discriminations should not be surprising. In *McGautha* v. *California*, 402 U. S., at 207, this Court held "that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is [not] offensive to anything in the Constitution." This was an open invitation to discrimination.

There is also overwhelming evidence that the death penalty is employed against men and not women. Only 32 women have been executed since 1930, while 3,827 men have met a similar fate.[153] It is difficult to understand why women have received such favored treatment since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes.[154]

It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the under-

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18–21, 52–53 (1964); R. Clark, Crime in America 335 (1970); Hochkammer, The Capital Punishment Controversy, 60 J. Crim. L. C. & P. S. 360, 361–362 (1969); Johnson, The Negro and Crime, 217 Annals Am. Acad. Pol. & Soc. Sci. 93, 95, 99 (1941); Johnson, Selective Factors in Capital Punishment, 36 Social Forces 165 (1957); United Nations, *supra*, n. 77, ¶ 69, at 98; Williams, The Death Penalty and the Negro, 67 Crisis 501, 511 (1960); M. Wolfgang & B. Cohen, Crime and Race: Conceptions and Misconceptions 77, 80–81, 85–86 (1970); Wolfgang, Kelly, & Nolde, Comparison of the Executed and the Commuted Among Admissions to Death Row, 53 J. Crim. L. C. & P. S. 301 (1962). MR. JUSTICE DOUGLAS explores the discriminatory application of the death penalty at great length, *ante*, at 249–257.

[153] National Prisoner Statistics No. 45, Capital Punishment 1930–1968, p. 28 (Aug. 1969).

[154] Men kill between four and five times more frequently than women. See Wolfgang, A Sociological Analysis of Criminal Homicide, in Bedau, *supra*, n. 45, at 74, 75. Hence, it would not be irregular to see four or five times as many men executed as women. The statistics show a startlingly greater disparity, however. United Nations, *supra*, n. 77, ¶ 67, at 97–98.

privileged members of society.[155] It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop. Ignorance is perpetuated and apathy soon becomes its mate, and we have today's situation.

Just as Americans know little about who is executed and why, they are unaware of the potential dangers of executing an innocent man. Our "beyond a reasonable doubt" burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof. Various studies have shown that people whose innocence is later convincingly established are convicted and sentenced to death.[156]

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[155] Criminal Justice: The General Aspects, in Bedau, *supra*, at 405, 411; Bedau, Capital Punishment in Oregon, 1903–64, 45 Ore. L. Rev. 1 (1965); Bedau, Death Sentences in New Jersey, 1907–1960, 19 Rutgers L. Rev. 1 (1964); R. Clark, Crime in America 335 (1970); C. Duffy & A. Hirshberg, 88 Men and 2 Women 256–257 (1962); Carter & Smith, The Death Penalty in California: A Statistical and Composite Portrait, 15 Crime & Delin. 62 (1969); Hearings, *supra*, n. 80, at 124–125 (statement of Dr. West); Koeninger, Capital Punishment in Texas, 1924–1968, 15 Crime & Delin. 132 (1969); McGee, *supra*, n. 116, at 11–12.

[156] See, *e. g.*, E. Borchard, Convicting the Innocent (1932); J. Frank & B. Frank, Not Guilty (1957); E. Gardner, Court of Last Resort (1952). These three books examine cases in which innocent persons were sentenced to die. None of the innocents was actually executed, however. Bedau has abstracted 74 cases occurring in the United States since 1893 in which a wrongful con-

Proving one's innocence after a jury finding of guilt is almost impossible. While reviewing courts are willing to entertain all kinds of collateral attacks where a sentence of death is involved, they very rarely dispute the jury's interpretation of the evidence. This is, perhaps, as it should be. But, if an innocent man has been found guilty, he must then depend on the good faith of the prosecutor's office to help him establish his innocence. There is evidence, however, that prosecutors do not welcome the idea of having convictions, which they labored hard to secure, overturned, and that their cooperation is highly unlikely.[157]

No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real.[158] We have no way of

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viction for murder was alleged and usually proved "beyond doubt." In almost every case, the convictions were sustained on appeal. Bedau seriously contends that innocent persons were actually executed. Murder, Errors of Justice, and Capital Punishment, in Bedau, *supra*, n. 45, at 434, 438. See also Black, The Crisis in Capital Punishment, 31 Md. L. Rev. 289 (1971); Hirschberg, Wrongful Convictions, 13 Rocky Mt. L. Rev. 20 (1940); Pollak, The Errors of Justice, 284 Annals Am. Acad. Pol. & Soc. Sci. 115 (1952).

[157] E. Gardner, Court of Last Resort 178 (1952).

[158] MR. JUSTICE DOUGLAS recognized this fact when he wrote:

"One who reviews the records of criminal trials need not look long to find an instance where the issue of guilt or innocence hangs in delicate balance. A judge who denies a stay of execution in a capital case often wonders if an innocent man is going to his death. . . .

"Those doubts exist because our system of criminal justice does not work with the efficiency of a machine—errors are made and innocent as well as guilty people are sometimes punished. . . .

". . . We believe that it is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned.

"Yet the sad truth is that a cog in the machine often slips: memories fail; mistaken identifications are made; those who wield the power of life and death itself—the police officer, the witness, the prosecutor, the juror, and even the judge—become overzealous in

judging how many innocent persons have been executed but we can be certain that there were some. Whether there were many is an open question made difficult by the loss of those who were most knowledgeable about the crime for which they were convicted. Surely there will be more as long as capital punishment remains part of our penal law.

While it is difficult to ascertain with certainty the degree to which the death penalty is discriminatorily imposed or the number of innocent persons sentenced to die, there is one conclusion about the penalty that is universally accepted—*i. e.*, it "tends to distort the course of the criminal law." [159] As Mr. Justice Frankfurter said:

> "I am strongly against capital punishment . . . . When life is at hazard in a trial, it sensationalizes the whole thing almost unwittingly; the effect on juries, the Bar, the public, the Judiciary, I regard as very bad. I think scientifically the claim of deterrence is not worth much. Whatever proof there may be in my judgment does not outweigh the social loss due to the inherent sensationalism of a trial for life." [160]

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their concern that criminals be brought to justice. And at times there is a venal combination between the police and a witness." Foreword, J. Frank & B. Frank, Not Guilty 11–12 (1957).

There has been an "incredible lag" between the development of modern scientific methods of investigation and their application to criminal cases. When modern methodology is available, prosecutors have the resources to utilize it, whereas defense counsel often may not. Lassers, Proof of Guilt in Capital Cases—An Unscience, 58 J. Crim. L. C. & P. S. 310 (1967). This increases the chances of error.

[159] Ehrmann, The Death Penalty and the Administration of Justice, 284 Annals Am. Acad. Pol. & Soc. Sci. 73, 83 (1952).

[160] F. Frankfurter, Of Law and Men 81 (1956).

The deleterious effects of the death penalty are also felt otherwise than at trial. For example, its very existence "inevitably sabotages a social or institutional program of reformation." [161] In short "[t]he presence of the death penalty as the keystone of our penal system bedevils the administration of criminal justice all the way down the line and is the stumbling block in the path of general reform and of the treatment of crime and criminals." [162]

Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice.[163] For this reason alone capital punishment cannot stand.

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[161] B. Eshelman & F. Riley, Death Row Chaplain 222 (1962).

[162] McCafferty, Major Trends in the Use of Capital Punishment, 25 Fed. Prob., No. 3, pp. 15, 21 (Sept. 1961) (quoting Dr. S. Glueck of Harvard University).

[163] MR. JUSTICE POWELL suggests that this conclusion is speculative, and he is certainly correct. But the mere recognition of this truth does not undercut the validity of the conclusion. MR. JUSTICE POWELL himself concedes that judges somehow know that certain punishments are no longer acceptable in our society; for example, he refers to branding and pillorying. Whence comes this knowledge? The answer is that it comes from our intuition as human beings that our fellow human beings no longer will tolerate such punishments.

I agree wholeheartedly with the implication in my Brother POWELL's opinion that judges are not free to strike down penalties that they find personally offensive. But, I disagree with his suggestion that it is improper for judges to ask themselves whether a specific punishment is morally acceptable to the American public. Contrary to some current thought, judges have not lived lives isolated from a broad range of human experience. They have come into contact with many people, many ways of life, and many philosophies. They have learned to share with their fellow human beings common views of morality. If, after drawing on this experience and considering the vast range of people and views that they have encountered, judges conclude that these people would not

VII

To arrive at the conclusion that the death penalty violates the Eighth Amendment, we have had to engage in a long and tedious journey. The amount of information that we have assembled and sorted is enormous.

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knowingly tolerate a specific penalty in light of its costs, then this conclusion is entitled to weight. See Frankel, Book Review, 85 Harv. L. Rev. 354 (1971). Judges can find assistance in determining whether they are being objective, rather than subjective, by referring to the attitudes of the persons whom most citizens consider our "ethical leaders." See *Repouille* v. *United States*, 165 F. 2d, at 154 (Frank, J., dissenting).

I must also admit that I am confused as to the point that my Brother POWELL seeks to make regarding the underprivileged members of our society. If he is stating that this Court cannot solve all of their problems in the context of this case, or even many of them, I would agree with him. But if he is opining that it is only the poor, the ignorant, the racial minorities, and the hapless in our society who are executed; that they are executed for no real reason other than to satisfy some vague notion of society's cry for vengeance; and that knowing these things, the people of this country would not care, then I most urgently disagree.

There is too much crime, too much killing, too much hatred in this country. If the legislatures could eradicate these elements from our lives by utilizing capital punishment, then there would be a valid purpose for the sanction and the public would surely accept it. It would be constitutional. As THE CHIEF JUSTICE and MR. JUSTICE POWELL point out, however, capital punishment has been with us a long time. What purpose has it served? The evidence is that it has served none. I cannot agree that the American people have been so hardened, so embittered that they want to take the life of one who performs even the basest criminal act knowing that the execution is nothing more than bloodlust. This has not been my experience with my fellow citizens. Rather, I have found that they earnestly desire their system of punishments to make sense in order that it can be a morally justifiable system. See generally Arnold, The Criminal Trial As a Symbol of Public Morality, in Criminal Justice In Our Time 137 (A. Howard ed. 1967).

Yet, I firmly believe that we have not deviated in the slightest from the principles with which we began.

At a time in our history when the streets of the Nation's cities inspire fear and despair, rather than pride and hope, it is difficult to maintain objectivity and concern for our fellow citizens. But, the measure of a country's greatness is its ability to retain compassion in time of crisis. No nation in the recorded history of man has a greater tradition of revering justice and fair treatment for all its citizens in times of turmoil, confusion, and tension than ours. This is a country which stands tallest in troubled times, a country that clings to fundamental principles, cherishes its constitutional heritage, and rejects simple solutions that compromise the values that lie at the roots of our democratic system.

In striking down capital punishment, this Court does not malign our system of government. On the contrary, it pays homage to it. Only in a free society could right triumph in difficult times, and could civilization record its magnificent advancement. In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute. We achieve "a major milestone in the long road up from barbarism" [164] and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment.[165]

I concur in the judgments of the Court.

[Appendices I, II, and III follow.]

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[164] R. Clark, Crime in America 336 (1970).

[165] Some jurisdictions have *de facto* abolition; others have *de jure*. *Id.*, at 330; Hearings, *supra*, n. 80, at 9–10 (statement of M. DiSalle). See generally Patrick, The Status of Capital Punishment: A World Perspective, 56 J. Crim. L. C. & P. S. 397 (1965); United Nations, *supra*, n. 77, ¶¶ 10–17, 63–65, at 83–85, 96–97; Brief for Petitioner in No. 68–5027, App. E (*Aikens* v. *California*, 406 U. S. 813 (1972)).

APPENDIX I TO OPINION OF MARSHALL, J., CONCURRING

ABOLITION OF THE DEATH PENALTY IN THE UNITED STATES: 1846–1968

(States are listed according to year most recent action was taken)

State	Year of partial abolition	Year of complete abolition	Year of restoration	Year of reabolition
New York	1965 [1]	—	—	—
Vermont	1965 [2]	—	—	—
West Virginia	—	1965	—	—
Iowa	—	1872	1878	1965
Oregon	—	1914	1920	1964
Michigan	1847 [3]	1963	—	—
Delaware	—	1958	1961	—
Alaska	—	1957	—	—
Hawaii	—	1957	—	—
South Dakota	—	1915	1939	—
Kansas	—	1907	1935	—
Missouri	—	1917	1919	—
Tennessee	1915 [4]	—	1919	—
Washington	—	1913	1919	—
Arizona	1916 [5]	—	1918	—
North Dakota	1915 [6]	—	—	—
Minnesota	—	1911	—	—
Colorado	—	1897	1901	—
Maine	—	1876	1883	1887
Wisconsin	—	1853	—	—
Rhode Island	1852 [7]	—	—	—

[1] Death penalty retained for persons found guilty of killing a peace officer who is acting in line of duty, and for prisoners under a life sentence who murder a guard or inmate while in confinement or while escaping from confinement.

[2] Death penalty retained for persons convicted of first-degree murder who commit a second "unrelated" murder, and for the first-degree murder of any law enforcement officer or prison employee who is in the performance of the duties of his office.

[3] Death penalty retained for treason. Partial abolition was voted in 1846, but was not put into effect until 1847.

[4] Death penalty retained for rape.

[5] Death penalty retained for treason.

[6] Death penalty retained for treason, and for first-degree murder committed by a prisoner who is serving a life sentence for first-degree murder.

[7] Death penalty retained for persons convicted of committing murder while serving a life sentence for any offense.

Based on National Prisoner Statistics No. 45, Capital Punishment 1930–1968, p. 30 (Aug. 1969).

APPENDIX II TO OPINION OF MARSHALL, J., CONCURRING

CRUDE HOMICIDE DEATH RATES, PER 100,000 POPULATION, AND NUMBER OF EXECUTIONS IN CERTAIN AMERICAN STATES: 1920–1955

Year	Maine*	N. H.		Vt.		Mass.		R. I.*	Conn.	
	Rates	Rates	Exec.	Rates	Exec.	Rates	Exec.	Rates	Rates	Exec.
1920	1.4	1.8		2.3		2.1	1	1.8	3.9	1
1921	2.2	2.2		1.7		2.8		3.1	2.9	2
1922	1.7	1.6		1.1		2.6		2.2	2.9	1
1923	1.7	2.7		1.4		2.8	1	3.5	3.1	
1924	1.5	1.5		.6		2.7	1	2.0	3.5	
1925	2.2	1.3		.6		2.7		1.8	3.7	
1926	1.1	.9		2.2		2.0	1	3.2	2.9	1
1927	1.9	.7		.8		2.1	6	2.7	2.3	2
1928	1.6	1.3		1.4		1.9	3	2.7	2.7	
1929	1.0	1.5		1.4		1.7	6	2.3	2.6	1
1930	1.8	.9		1.4		1.8		2.0	3.2	2
1931	1.4	2.1		1.1	1	2.0	2	2.2	2.7	
1932	2.0	.2		1.1		2.1	1	1.6	2.9	
1933	3.3	2.7		1.6		2.5		1.9	1.8	
1934	1.1	1.4		1.9		2.2	4	1.8	2.4	
1935	1.4	1.0		.3		1.8	4	1.6	1.9	
1936	2.2	1.0		2.1		1.6	2	1.2	2.7	1
1937	1.4	1.8		1.8		1.9		2.3	2.0	1
1938	1.5	1.8		1.3		1.3	3	1.2	2.1	1
1939	1.2	2.3	1	.8		1.4	2	1.6	1.3	
1940	1.5	1.4		.8		1.5		1.4	1.8	2
1941	1.1	.4		2.2		1.3	1	.8	2.2	
1942	1.7	.2		.9		1.3	2	1.2	2.5	
1943	1.7	.9		.6		.9	3	1.5	1.6	2
1944	1.5	1.1		.3		1.4		.6	1.9	1
1945	.9	.7		2.9		1.5		1.1	1.5	1
1946	1.4	.8		1.7		1.4	1	1.5	1.6	3
1947	1.2	.6		1.1	1	1.6	2	1.5	1.9	
1948	1.7	1.0		.8		1.4		2.7	1.7	1
1949	1.7	1.5		.5		1.1		.5	1.8	
1950	1.5	1.3		.5		1.3		1.5	1.4	
1951	2.3	.6		.5		1.0		.9	2.0	
1952	1.0	1.5		.5		1.0		1.5	1.7	
1953	1.4	.9		.3		1.0		.6	1.5	
1954	1.7	.5		1.6	2	1.0		1.3	1.3	
1955	1.2	1.1		.5		1.2		1.7	1.3	3

*Maine has totally abolished the death penalty, and Rhode Island has severely limited its imposition. Based on ALI, *supra*, n. 98, at 25.

APPENDIX III TO OPINION OF MARSHALL, J., CONCURRING

CRUDE HOMICIDE DEATH RATES, PER 100,000 POPULATION, AND NUMBER OF EXECUTIONS IN CERTAIN AMERICAN STATES: 1920–1955

Year	Mich.*	Ohio		Ind.		Minn.*	Iowa		Wis.*	N.D.*	S.D.		Neb.	
		Rate	Ex.	Rate	Ex.		Rate	Ex.			Rate	Ex.	Rate	Ex.
1920	5.5	6.9	3	4.7	2	3.1	**		1.7	**	**	***	4.2	
1921	4.7	7.9	10	6.4		4.4			2.2				4.9	
1922	4.3	7.3	12	5.7	2	3.6		3	1.8				4.5	
1923	6.1	7.8	10	6.1		2.9	2.1	2	2.2				4.1	
1924	7.1	6.9	10	7.3		3.2	2.7	1	1.8	2.1			4.4	
1925	7.4	8.1	13	6.6	1	3.8	2.7	2	2.3	2.0			4.0	
1926	10.4	8.6	7	5.8	3	2.2	2.3		2.6	1.8			2.7	
1927	8.2	8.6	8	6.3	1	2.6	2.4		2.6	1.6			3.5	
1928	7.0	8.2	7	7.0	1	2.8	2.3		2.1	1.0			3.7	
1929	8.2	8.3	5	7.0	1	2.2	2.6		2.3	1.2			3.0	
1930	6.7	9.3	8	6.4	1	3.8	3.2		3.1	3.5	1.9		3.5	
1931	6.2	9.0	10	6.5	1	2.9	2.5	1	3.6	2.0	2.3		3.6	
1932	5.7	8.1	7	6.7	2	2.9	2.9		2.8	1.2	1.6		3.7	
1933	5.1	8.2	11	5.6	3	3.5	2.9		1.9	1.2	1.7		3.2	
1934	4.2	7.7	7	7.1	4	3.4	2.3		2.4	1.6	3.0		4.4	
1935	4.2	7.1	10	4.4	2	2.6	2.0	3	1.4	2.3	2.0		3.4	
1936	4.0	6.6	6	5.2	2	2.3	1.8		1.7	2.0	1.2		2.5	
1937	4.6	5.7	1	4.7	5	1.6	2.2		2.2	1.6	.1		2.0	
1938	3.4	5.1	12	4.4	8	1.6	1.4	4	2.0	2.4	.9		1.6	
1939	3.1	4.8	10	3.8	3	1.6	1.8		1.4	1.2	2.8		2.1	
1940	3.0	4.6	2	3.3		1.2	1.3	1	1.3	1.4	2.2		1.0	
1941	3.2	4.2	4	3.1	1	1.7	1.3	1	1.4	2.3	1.0		2.1	
1942	3.2	4.6	2	3.2	1	1.7	1.2		1.6	1.4	.9		1.8	
1943	3.3	4.4	5	2.8		1.2	1.0		1.1	.6	1.4		2.4	
1944	3.3	3.9	2	2.8		1.4	1.7	1	.9	.9	1.6		1.3	
1945	3.7	4.9	7	4.0	1	1.9	1.6	1	1.6	1.0	2.0		1.2	1
1946	3.2	5.2	2	3.9	1	1.6	1.8	2	.9	1.5	1.1		2.1	
1947	3.8	4.9	5	3.8		1.2	1.9		1.4	.4	1.0	1	2.2	
1948	3.4	4.5	7	4.2		1.9	1.4		.9	.9	2.0		2.5	1
1949	3.5	4.4	15	3.2	3	1.1	.9	1	1.3	.7	2.3		1.8	
1950	3.9	4.1	4	3.6	1	1.2	1.3		1.1	.5	1.1		2.9	
1951	3.7	3.8	4	3.9	1	1.3	1.5		1.1	.5	.9		1.0	
1952	3.3	4.0	4	3.8		1.3	1.5	1	1.6	.8	2.3		1.6	1
1953	4.6	3.6	4	4.0		1.5	1.1		1.2	1.1	1.1		2.0	
1954	3.3	3.4	4	3.2		1.0	1.0		1.1	.5	1.5		2.3	
1955	3.3	3.1		3.1		1.1	1.2		1.1	.8	1.8		1.3	

*Michigan, Minnesota, and Wisconsin have completely abolished capital punishment. North Dakota has severely restricted its use.

**Iowa, North Dakota, and South Dakota were not admitted to the national death registration area until 1923, 1924, and 1930 respectively.

***South Dakota introduced the death penalty in 1939.

Based on ALI, *supra*, n. 98, at 28. See also *id.*, at 32–34.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST join, dissenting.

At the outset it is important to note that only two members of the Court, MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, have concluded that the Eighth Amendment prohibits capital punishment for all crimes and under all circumstances. MR. JUSTICE DOUGLAS has also determined that the death penalty contravenes the Eighth Amendment, although I do not read his opinion as necessarily requiring final abolition of the penalty.[1] For the reasons set forth in Parts I–IV of this opinion, I conclude that the constitutional prohibition against "cruel and unusual punishments" cannot be construed to bar the imposition of the punishment of death.

MR. JUSTICE STEWART and MR. JUSTICE WHITE have concluded that petitioners' death sentences must be set aside because prevailing sentencing practices do not comply with the Eighth Amendment. For the reasons set forth in Part V of this opinion, I believe this approach fundamentally misconceives the nature of the Eighth Amendment guarantee and flies directly in the face of controlling authority of extremely recent vintage.

I

If we were possessed of legislative power, I would either join with MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes. Our constitutional inquiry, however, must be divorced from personal feelings as to the morality and efficacy of the death penalty, and be confined to the meaning and applicability of the uncertain language of the Eighth Amendment. There is no novelty in being called upon to interpret a constitutional provision that is less than

[1] See n. 25, *infra*.

self-defining, but, of all our fundamental guarantees, the ban on "cruel and unusual punishments" is one of the most difficult to translate into judicially manageable terms. The widely divergent views of the Amendment expressed in today's opinions reveal the haze that surrounds this constitutional command. Yet it is essential to our role as a court that we not seize upon the enigmatic character of the guarantee as an invitation to enact our personal predilections into law.

Although the Eighth Amendment literally reads as prohibiting only those punishments that are both "cruel" and "unusual," history compels the conclusion that the Constitution prohibits all punishments of extreme and barbarous cruelty, regardless of how frequently or infrequently imposed.

The most persuasive analysis of Parliament's adoption of the English Bill of Rights of 1689—the unquestioned source of the Eighth Amendment wording—suggests that the prohibition against "cruel and unusual punishments" was included therein out of aversion to severe punishments not legally authorized and not within the jurisdiction of the courts to impose. To the extent that the term "unusual" had any importance in the English version, it was apparently intended as a reference to illegal punishments.[2]

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[2] See Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839, 852–860 (1969). Earlier drafts of the Bill of Rights used the phrase "cruel and illegal." It is thought that the change to the "cruel and unusual" wording was inadvertent and not intended to work any change in meaning. *Ibid.* The historical background of the English Bill of Rights is set forth in the opinion of MR. JUSTICE MARSHALL, *ante*, at 316–318.

It is intimated in the opinion of MR. JUSTICE DOUGLAS, *ante*, at 242–245, that the term "unusual" was included in the English Bill of Rights as a protest against the discriminatory application of punishments to minorities. However, the history of capital punishment in

From every indication, the Framers of the Eighth Amendment intended to give the phrase a meaning far different from that of its English precursor. The records of the debates in several of the state conventions called to ratify the 1789 draft Constitution submitted prior to the addition of the Bill of Rights show that the Framers' exclusive concern was the absence of any ban on tortures.[3] The later inclusion of the "cruel and unusual punishments" clause was in response to these objections. There was no discussion of the interrelationship of the terms "cruel" and "unusual," and there is nothing in the debates supporting the inference that the Founding Fathers would have been receptive to torturous or excessively cruel punishments even if usual in character or authorized by law.

The cases decided under the Eighth Amendment are consistent with the tone of the ratifying debates. In *Wilkerson* v. *Utah,* 99 U. S. 130 (1879), this Court held that execution by shooting was not a prohibited mode of carrying out a sentence of death. Speaking to the mean-

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England dramatically reveals that no premium was placed on equal justice for all, either before or after the Bill of Rights of 1689. From the time of Richard I until 1826 the death penalty was authorized in England for treason and all felonies except larceny and mayhem with the further exception that persons entitled to benefit of clergy were subject to no penalty or at most a very lenient penalty upon the commission of a felony. Benefit of clergy grew out of the exemption of the clergy from the jurisdiction of the lay courts. The exemption expanded to include assistants to clergymen, and by 1689, any male who could read. Although by 1689 numerous felonies had been deemed "nonclergyable," the disparity in punishments imposed on the educated and uneducated remained for most felonies until the early 18th century. See 1 J. Stephen, History of the Criminal Law of England 458 *et seq.* (1883).

[3] See 2 J. Elliot's Debates 111 (2d ed. 1876); 3 *id.*, at 447–448, 451–452.

ing of the Cruel and Unusual Punishments Clause, the Court stated,

> "[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution." *Id.*, at 136.

The Court made no reference to the role of the term "unusual" in the constitutional guarantee.

In the case of *In re Kemmler*, 136 U. S. 436 (1890), the Court held the Eighth Amendment inapplicable to the States and added the following dictum:

> "So that, if the punishment prescribed for an offence against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the . . . [prohibition of the New York constitution]. And we think this equally true of the Eighth Amendment, in its application to Congress.
>
> ". . . Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." *Id.*, at 446–447.

This language again reveals an exclusive concern with extreme cruelty. The Court made passing reference to the finding of the New York courts that electrocution was an "unusual" punishment, but it saw no need to discuss the significance of that term as used in the Eighth Amendment.

Opinions in subsequent cases also speak of extreme cruelty as though that were the sum and substance of the constitutional prohibition. See *O'Neil* v. *Vermont*, 144 U. S. 323, 339–340 (1892) (Field, J., dissenting); *Weems*

v. *United States*, 217 U. S. 349, 372–373 (1910); *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 464 (1947). As summarized by Mr. Chief Justice Warren in the plurality opinion in *Trop* v. *Dulles*, 356 U. S. 86, 100 n. 32 (1958):

> "Whether the word 'unusual' has any qualitative meaning different from 'cruel' is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. See *Weems* v. *United States, supra; O'Neil* v. *Vermont, supra; Wilkerson* v. *Utah, supra.* These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word 'unusual.'"

I do not suggest that the presence of the word "unusual" in the Eighth Amendment is merely vestigial, having no relevance to the constitutionality of any punishment that might be devised. But where, as here, we consider a punishment well known to history, and clearly authorized by legislative enactment, it disregards the history of the Eighth Amendment and all the judicial comment that has followed to rely on the term "unusual" as affecting the outcome of these cases. Instead, I view these cases as turning on the single question whether capital punishment is "cruel" in the constitutional sense. The term "unusual" cannot be read as limiting the ban on "cruel" punishments or as somehow expanding the meaning of the term "cruel." For this reason I am unpersuaded by the facile argument that since capital punishment has always been cruel in the everyday sense of the word, and has become unusual due to decreased use, it is, therefore, now "cruel and unusual."

II

Counsel for petitioners properly concede that capital punishment was not impermissibly cruel at the time of the adoption of the Eighth Amendment. Not only do the records of the debates indicate that the Founding Fathers were limited in their concern to the prevention of torture, but it is also clear from the language of the Constitution itself that there was no thought whatever of the elimination of capital punishment. The opening sentence of the Fifth Amendment is a guarantee that the death penalty not be imposed "unless on a presentment or indictment of a Grand Jury." The Double Jeopardy Clause of the Fifth Amendment is a prohibition against being "twice put in jeopardy of life" for the same offense. Similarly, the Due Process Clause commands "due process of law" before an accused can be "deprived of life, liberty, or property." Thus, the explicit language of the Constitution affirmatively acknowledges the legal power to impose capital punishment; it does not expressly or by implication acknowledge the legal power to impose any of the various punishments that have been banned as cruel since 1791. Since the Eighth Amendment was adopted on the same day in 1791 as the Fifth Amendment, it hardly needs more to establish that the death penalty was not "cruel" in the constitutional sense at that time.

In the 181 years since the enactment of the Eighth Amendment, not a single decision of this Court has cast the slightest shadow of a doubt on the constitutionality of capital punishment. In rejecting Eighth Amendment attacks on particular modes of execution, the Court has more than once implicitly denied that capital punishment is impermissibly "cruel" in the constitutional sense. *Wilkerson* v. *Utah*, 99 U. S. 130 (1879); *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S., at 464. *In*

re Kemmler, 136 U. S. 436 (1890) (dictum). It is only 14 years since Mr. Chief Justice Warren, speaking for four members of the Court, stated without equivocation:

> "Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty." *Trop* v. *Dulles,* 356 U. S., at 99.

It is only one year since Mr. Justice Black made his feelings clear on the constitutional issue:

> "The Eighth Amendment forbids 'cruel and unusual punishments.' In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable to me that the framers intended to end capital punishment by the Amendment." *McGautha* v. *California,* 402 U. S. 183, 226 (1971) (separate opinion).

By limiting its grants of certiorari, the Court has refused even to hear argument on the Eighth Amendment claim on two occasions in the last four years. *Witherspoon* v. *Illinois,* cert. granted, 389 U. S. 1035, rev'd, 391 U. S. 510 (1968); *McGautha* v. *California,* cert. granted, 398 U. S. 936 (1970), aff'd, 402 U. S. 183 (1971). In these cases the Court confined its attention to the procedural aspects of capital trials, it being implicit that the punishment itself could be constitutionally imposed. Nonetheless, the Court has now been asked to hold that a punishment clearly permissible under the Constitution at the time of its adoption and accepted as such by every

member of the Court until today, is suddenly so cruel as to be incompatible with the Eighth Amendment.

Before recognizing such an instant evolution in the law, it seems fair to ask what factors have changed that capital punishment should now be "cruel" in the constitutional sense as it has not been in the past. It is apparent that there has been no change of constitutional significance in the nature of the punishment itself. Twentieth century modes of execution surely involve no greater physical suffering than the means employed at the time of the Eighth Amendment's adoption. And although a man awaiting execution must inevitably experience extraordinary mental anguish,[4] no one suggests that this anguish is materially different from that experienced by condemned men in 1791, even though protracted appellate review processes have greatly increased the waiting time on "death row." To be sure, the ordeal of the condemned man may be thought cruel in the sense that all suffering is thought cruel. But if the Constitution proscribed every punishment producing severe emotional stress, then capital punishment would clearly have been impermissible in 1791.

However, the inquiry cannot end here. For reasons unrelated to any change in intrinsic cruelty, the Eighth Amendment prohibition cannot fairly be limited to those punishments thought excessively cruel and barbarous at the time of the adoption of the Eighth Amendment. A punishment is inordinately cruel, in the sense we must deal with it in these cases, chiefly as perceived by the society so characterizing it. The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change. This notion is not

[4] But see Bluestone & McGahee, Reaction to Extreme Stress: Impending Death by Execution, 119 Am. J. Psychiatry 393 (1962).

new to Eighth Amendment adjudication. In *Weems* v. *United States*, 217 U. S. 349 (1910), the Court referred with apparent approval to the opinion of the commentators that "[t]he clause of the Constitution . . . may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." 217 U. S., at 378. Mr. Chief Justice Warren, writing the plurality opinion in *Trop* v. *Dulles*, *supra*, stated, "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U. S., at 101. Nevertheless, the Court up to now has never actually held that a punishment has become impermissibly cruel due to a shift in the weight of accepted social values; nor has the Court suggested judicially manageable criteria for measuring such a shift in moral consensus.

The Court's quiescence in this area can be attributed to the fact that in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people. For this reason, early commentators suggested that the "cruel and unusual punishments" clause was an unnecessary constitutional provision.[5] As acknowledged in the principal brief for petitioners, "both in constitutional contemplation and in fact, it is the legislature, not the Court, which responds to public opinion and immediately reflects the society's standards of decency." [6]

[5] See 2 J. Story, On the Constitution § 1903 (5th ed. 1891); 1 T. Cooley, Constitutional Limitations 694 (8th ed. 1927). See also Joseph Story on Capital Punishment (ed. by J. Hogan), 43 Calif. L. Rev. 76 (1955).

[6] Brief for Petitioner in *Aikens* v. *California*, No. 68–5027, p. 19 (cert. dismissed, 406 U. S. 813 (1972)). See *post*, at 443 n. 38. This, plainly, was the foundation of Mr. Justice Black's strong views on this subject expressed most recently in *McGautha* v. *California*, 402 U. S. 183, 226 (1971) (separate opinion).

Accordingly, punishments such as branding and the cutting off of ears, which were commonplace at the time of the adoption of the Constitution, passed from the penal scene without judicial intervention because they became basically offensive to the people and the legislatures responded to this sentiment.

Beyond any doubt, if we were today called upon to review such punishments, we would find them excessively cruel because we could say with complete assurance that contemporary society universally rejects such bizarre penalties. However, this speculation on the Court's probable reaction to such punishments is not of itself significant. The critical fact is that this Court has never had to hold that a mode of punishment authorized by a domestic legislature was so cruel as to be fundamentally at odds with our basic notions of decency. Cf. *Weems* v. *United States, supra.* Judicial findings of impermissible cruelty have been limited, for the most part, to offensive punishments devised without specific authority by prison officials, not by legislatures. See, *e. g., Jackson* v. *Bishop,* 404 F. 2d 571 (CA8 1968); *Wright* v. *McMann,* 387 F. 2d 519 (CA2 1967). The paucity of judicial decisions invalidating legislatively prescribed punishments is powerful evidence that in this country legislatures have in fact been responsive—albeit belatedly at times—to changes in social attitudes and moral values.

I do not suggest that the validity of legislatively authorized punishments presents no justiciable issue under the Eighth Amendment, but, rather, that the primacy of the legislative role narrowly confines the scope of judicial inquiry. Whether or not provable, and whether or not true at all times, in a democracy the legislative judgment is presumed to embody the basic standards of decency prevailing in the society. This presumption can only be negated by unambiguous and compelling evidence of legislative default.

III

There are no obvious indications that capital punishment offends the conscience of society to such a degree that our traditional deference to the legislative judgment must be abandoned. It is not a punishment such as burning at the stake that everyone would ineffably find to be repugnant to all civilized standards. Nor is it a punishment so roundly condemned that only a few aberrant legislatures have retained it on the statute books. Capital punishment is authorized by statute in 40 States, the District of Columbia, and in the federal courts for the commission of certain crimes.[7] On four occasions in the last 11 years Congress has added to the list of federal crimes punishable by death.[8] In looking for reliable indicia of contemporary attitude, none more trustworthy has been advanced.

One conceivable source of evidence that legislatures have abdicated their essentially barometric role with respect to community values would be public opinion polls, of which there have been many in the past decade addressed to the question of capital punishment. Without assessing the reliability of such polls, or intimating that any judicial reliance could ever be placed on them,

[7] See Department of Justice, National Prisoner Statistics No. 46, Capital Punishment 1930–1970, p. 50 (Aug. 1971). Since the publication of the Department of Justice report, capital punishment has been judicially abolished in California, *People* v. *Anderson*, 6 Cal. 3d 628, 493 P. 2d 880, cert. denied, 406 U. S. 958 (1972). The States where capital punishment is no longer authorized are Alaska, California, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia, and Wisconsin.

[8] See Act of Jan. 2, 1971, Pub. L. 91–644, Tit. IV, § 15, 84 Stat. 1891, 18 U. S. C. § 351; Act of Oct. 15, 1970, Pub. L. 91–452, Tit. XI, § 1102 (a), 84 Stat. 956, 18 U. S. C. § 844 (f)(i); Act of Aug. 28, 1965, 79 Stat. 580, 18 U. S. C. § 1751; Act of Sept. 5, 1961, § 1, 75 Stat. 466, 49 U. S. C. § 1472 (i). See also opinion of MR. JUSTICE BLACKMUN, *post*, at 412–413.

it need only be noted that the reported results have shown nothing approximating the universal condemnation of capital punishment that might lead us to suspect that the legislatures in general have lost touch with current social values.[9]

Counsel for petitioners rely on a different body of empirical evidence. They argue, in effect, that the number of cases in which the death penalty is imposed, as compared with the number of cases in which it is statutorily available, reflects a general revulsion toward the penalty that would lead to its repeal if only it were more generally and widely enforced. It cannot be gainsaid that by the choice of juries—and sometimes judges[10]—the death penalty is imposed in far fewer than half the cases in which it is available.[11] To go further and char-

[9] A 1966 poll indicated that 42% of those polled favored capital punishment while 47% opposed it, and 11% had no opinion. A 1969 poll found 51% in favor, 40% opposed, and 9% with no opinion. See Erskine, The Polls: Capital Punishment, 34 Public Opinion Quarterly 290 (1970).

[10] The jury plays the predominant role in sentencing in capital cases in this country. Available evidence indicates that where the judge determines the sentence, the death penalty is imposed with a slightly greater frequency than where the jury makes the determination. H. Kalven & H. Zeisel, The American Jury 436 (1966).

[11] In the decade from 1961–1970, an average of 106 persons per year received the death sentence in the United States, ranging from a low of 85 in 1967 to a high of 140 in 1961; 127 persons received the death sentence in 1970. Department of Justice, National Prisoner Statistics No. 46, Capital Punishment 1930–1970, p. 9. See also Bedau, The Death Penalty in America, 35 Fed. Prob., No. 2, p. 32 (1971). Although accurate figures are difficult to obtain, it is thought that from 15% to 20% of those convicted of murder are sentenced to death in States where it is authorized. See, *e. g.*, McGee, Capital Punishment as Seen by a Correctional Administrator, 28 Fed. Prob., No. 2, pp. 11, 12 (1964); Bedau, Death Sentences in New Jersey 1907–1960, 19 Rutgers L. Rev. 1, 30 (1964); Florida Division of Corrections, Seventh Biennial Report (July 1, 1968, to June 30, 1970) 82 (1970); H. Kalven & H. Zeisel, The

acterize the rate of imposition as "freakishly rare," as petitioners insist, is unwarranted hyperbole. And regardless of its characterization, the rate of imposition does not impel the conclusion that capital punishment is now regarded as intolerably cruel or uncivilized.

It is argued that in those capital cases where juries have recommended mercy, they have given expression to civilized values and effectively renounced the legislative authorization for capital punishment. At the same time it is argued that where juries have made the awesome decision to send men to their deaths, they have acted arbitrarily and without sensitivity to prevailing standards of decency. This explanation for the infrequency of imposition of capital punishment is unsupported by known facts, and is inconsistent in principle with everything this Court has ever said about the functioning of juries in capital cases.

In *McGautha* v. *California, supra,* decided only one year ago, the Court held that there was no mandate in the Due Process Clause of the Fourteenth Amendment that juries be given instructions as to when the death penalty should be imposed. After reviewing the autonomy that juries have traditionally exercised in capital cases and noting the practical difficulties of framing manageable instructions, this Court concluded that judicially articulated standards were not needed to insure a responsible decision as to penalty. Nothing in *McGautha* licenses capital juries to act arbitrarily or assumes that they have so acted in the past. On the contrary, the assumption underlying the *McGautha* ruling is that juries "will act with

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American Jury 435–436 (1966). The rate of imposition for rape and the few other crimes made punishable by death in certain States is considerably lower. See, *e. g.*, Florida Division of Corrections, Seventh Biennial Report, *supra,* at 83; Partington, The Incidence of the Death Penalty for Rape in Virginia, 22 Wash. & Lee L. Rev. 43–44, 71–73 (1965).

due regard for the consequences of their decision." 402 U. S., at 208.

The responsibility of juries deciding capital cases in our system of justice was nowhere better described than in *Witherspoon* v. *Illinois, supra:*

> "[A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express *the conscience of the community* on the ultimate question of life or death."
>
> "And one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society' " 391 U. S., at 519 and n. 15 (emphasis added).

The selectivity of juries in imposing the punishment of death is properly viewed as a refinement on, rather than a repudiation of, the statutory authorization for that penalty. Legislatures prescribe the categories of crimes for which the death penalty should be available, and, acting as "the conscience of the community," juries are entrusted to determine in individual cases that the ultimate punishment is warranted. Juries are undoubtedly influenced in this judgment by myriad factors. The motive or lack of motive of the perpetrator, the degree of injury or suffering of the victim or victims, and the degree of brutality in the commission of the crime would seem to be prominent among these factors. Given the general awareness that death is no longer a routine punishment for the crimes for which it is made available, it is hardly surprising that juries have been increasingly meticulous in their imposition of the penalty. But to

assume from the mere fact of relative infrequency that only a random assortment of pariahs are sentenced to death, is to cast grave doubt on the basic integrity of our jury system.

It would, of course, be unrealistic to assume that juries have been perfectly consistent in choosing the cases where the death penalty is to be imposed, for no human institution performs with perfect consistency. There are doubtless prisoners on death row who would not be there had they been tried before a different jury or in a different State. In this sense their fate has been controlled by a fortuitous circumstance. However, this element of fortuity does not stand as an indictment either of the general functioning of juries in capital cases or of the integrity of jury decisions in individual cases. There is no empirical basis for concluding that juries have generally failed to discharge in good faith the responsibility described in *Witherspoon*—that of choosing between life and death in individual cases according to the dictates of community values.[12]

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[12] Counsel for petitioners make the conclusory statement that "[t]hose who are selected to die are the poor and powerless, personally ugly and socially unacceptable." Brief for Petitioner in No. 68–5027, p. 51. However, the sources cited contain no empirical findings to undermine the general premise that juries impose the death penalty in the most extreme cases. One study has discerned a statistically noticeable difference between the rate of imposition on blue collar and white collar defendants; the study otherwise concludes that juries do follow rational patterns in imposing the sentence of death. Note, A Study of the California Penalty Jury in First-Degree-Murder Cases, 21 Stan. L. Rev. 1297 (1969). See also H. Kalven & H. Zeisel, The American Jury 434–449 (1966).

Statistics are also cited to show that the death penalty has been imposed in a racially discriminatory manner. Such statistics suggest, at least as a historical matter, that Negroes have been sentenced to death with greater frequency than whites in several States, particularly for the crime of interracial rape. See, *e. g.*, Koeninger, Capital Punishment in Texas, 1924–1968, 15 Crime & Delin. 132 (1969);

The rate of imposition of death sentences falls far short of providing the requisite unambiguous evidence that the legislatures of 40 States and the Congress have turned their backs on current or evolving standards of decency in continuing to make the death penalty available. For, if selective imposition evidences a rejection of capital punishment in those cases where it is not imposed, it surely evidences a correlative affirmation of the penalty in those cases where it is imposed. Absent some clear indication that the continued imposition of the death penalty on a selective basis is violative of prevailing standards of civilized conduct, the Eighth Amendment cannot be said to interdict its use.

Note, Capital Punishment in Virginia, 58 Va. L. Rev. 97 (1972). If a statute that authorizes the discretionary imposition of a particular penalty for a particular crime is used primarily against defendants of a certain race, and if the pattern of use can be fairly explained only by reference to the race of the defendants, the Equal Protection Clause of the Fourteenth Amendment forbids continued enforcement of that statute in its existing form. Cf. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960).

To establish that the statutory authorization for a particular penalty is inconsistent with the dictates of the Equal Protection Clause, it is not enough to show how it was applied in the distant past. The statistics that have been referred to us cover periods when Negroes were systematically excluded from jury service and when racial segregation was the official policy in many States. Data of more recent vintage are essential. See *Maxwell* v. *Bishop*, 398 F. 2d 138, 148 (CA8 1968), vacated, 398 U. S. 262 (1970). While no statistical survey could be expected to bring forth absolute and irrefutable proof of a discriminatory pattern of imposition, a strong showing would have to be made, taking all relevant factors into account.

It must be noted that any equal protection claim is totally distinct from the Eighth Amendment question to which our grant of certiorari was limited in these cases. Evidence of a discriminatory pattern of enforcement does not imply that any use of a particular punishment is so morally repugnant as to violate the Eighth Amendment.

In two of these cases we have been asked to rule on the narrower question whether capital punishment offends the Eighth Amendment when imposed as the punishment for the crime of forcible rape.[13] It is true that the death penalty is authorized for rape in fewer States than it is for murder,[14] and that even in those States it is applied more sparingly for rape than for murder.[15] But for the reasons aptly brought out in the opinion of MR. JUSTICE POWELL, *post*, at 456–461, I do not believe these differences can be elevated to the level of an Eighth Amendment distinction. This blunt constitutional command cannot be sharpened to carve neat distinctions corresponding to the categories of crimes defined by the legislatures.

IV

Capital punishment has also been attacked as violative of the Eighth Amendment on the ground that it is not needed to achieve legitimate penal aims and is thus "unnecessarily cruel." As a pure policy matter, this approach has much to recommend it, but it seeks to give a dimension to the Eighth Amendment that it was never intended to have and promotes a line of inquiry that this Court has never before pursued.

The Eighth Amendment, as I have noted, was included in the Bill of Rights to guard against the use of torturous and inhuman punishments, not those of limited efficacy. One of the few to speak out against the adop-

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[13] *Jackson* v. *Georgia*, No. 69–5030; *Branch* v. *Texas*, No. 69–5031.

[14] Rape is punishable by death in 16 States and in the federal courts when committed within the special maritime and territorial jurisdiction of the United States. 18 U. S. C. § 2031. The States authorizing capital punishment for rape are Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia.

[15] See n. 11, *supra*.

tion of the Eighth Amendment asserted that it is often necessary to use cruel punishments to deter crimes.[16] But among those favoring the Amendment, no sentiment was expressed that a punishment of extreme cruelty could ever be justified by expediency. The dominant theme of the Eighth Amendment debates was that the ends of the criminal laws cannot justify the use of measures of extreme cruelty to achieve them. Cf. *Rochin* v. *California*, 342 U. S. 165, 172–173 (1952).

The apparent seed of the "unnecessary cruelty" argument is the following language, quoted earlier, found in *Wilkerson* v. *Utah, supra:*

> "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture . . . *and all others in the same line of unnecessary cruelty,* are forbidden by that amendment to the Constitution." 99 U. S., at 135–136 (emphasis added).

To lift the italicized phrase from the context of the *Wilkerson* opinion and now view it as a mandate for assessing the value of punishments in achieving the aims of penology is a gross distortion; nowhere are such aims even mentioned in the *Wilkerson* opinion. The only fair reading of this phrase is that punishments similar to torture in their extreme cruelty are prohibited by the Eighth Amendment. In *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S., at 463, 464, the Court made reference to the Eighth Amendment's prohibition against the infliction of "unnecessary pain" in carrying out an execution. The context makes abundantly clear that the Court was disapproving the wanton infliction of phys-

[16] 1 Annals of Cong. 754 (1789) (remarks of Rep. Livermore).

ical pain, and once again not advising pragmatic analysis of punishments approved by legislatures.[17]

Apart from these isolated uses of the word "unnecessary," nothing in the cases suggests that it is for the courts to make a determination of the efficacy of punishments. The decision in *Weems* v. *United States, supra,* is not to the contrary. In *Weems* the Court held that for the crime of falsifying public documents, the punishment imposed under the Philippine Code of 15 years' imprisonment at hard labor under shackles, followed by perpetual surveillance, loss of voting rights, loss of the right to hold public office, and loss of right to change domicile freely, was violative of the Eighth Amendment. The case is generally regarded as holding that a punishment may be excessively cruel within the meaning of the Eighth Amendment because it is grossly out of proportion to the severity of the crime; [18] some view the decision of the Court primarily as

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[17] Petitioner Francis had been sentenced to be electrocuted for the crime of murder. He was placed in the electric chair, and the executioner threw the switch. Due to a mechanical difficulty, death did not result. A new death warrant was issued fixing a second date for execution. The Court held that the proposed execution would not constitute cruel and unusual punishment or double jeopardy.

[18] There is no serious claim of disproportionality presented in these cases. Murder and forcible rape have always been regarded as among the most serious crimes. It cannot be said that the punishment of death is out of all proportion to the severity of these crimes.

The Court's decision in *Robinson* v. *California,* 370 U. S. 660 (1962), can be viewed as an extension of the disproportionality doctrine of the Eighth Amendment. The Court held that a statute making it a crime punishable by imprisonment to be a narcotics addict violated the Eighth Amendment. The Court in effect ruled that the status of being an addict is not a criminal act, and that any criminal punishment imposed for addiction exceeds the penal power of the States. The Court made no analysis of the necessity of imprisonment as a means of curbing addiction.

a reaction to the mode of the punishment itself.[19] Under any characterization of the holding, it is readily apparent that the decision grew out of the Court's overwhelming abhorrence of the imposition of the particular penalty for the particular crime; it was making an essentially moral judgment, not a dispassionate assessment of the need for the penalty. The Court specifically disclaimed "the right to assert a judgment against that of the legislature of the expediency of the laws . . . ." 217 U. S., at 378. Thus, apart from the fact that the Court in *Weems* concerned itself with the crime committed as well as the punishment imposed, the case marks no departure from the largely unarticulable standard of extreme cruelty. However intractable that standard may be, that is what the Eighth Amendment is all about. The constitutional provision is not addressed to social utility and does not command that enlightened principles of penology always be followed.

By pursuing the necessity approach, it becomes even more apparent that it involves matters outside the purview of the Eighth Amendment. Two of the several aims of punishment are generally associated with capital punishment—retribution and deterrence. It is argued that retribution can be discounted because that, after all, is what the Eighth Amendment seeks to eliminate. There is no authority suggesting that the Eighth Amendment was intended to purge the law of its retributive elements, and the Court has consistently assumed that retribution is a legitimate dimension of the punishment of crimes. See *Williams* v. *New York*, 337 U. S. 241, 248 (1949); *United States* v. *Lovett*, 328 U. S. 303, 324 (1946) (Frankfurter, J., concurring). Furthermore, responsible legal thinkers of widely varying

[19] See Packer, Making the Punishment Fit the Crime, 77 Harv. L. Rev. 1071, 1075 (1964).

persuasions have debated the sociological and philosophical aspects of the retribution question for generations, neither side being able to convince the other.[20] It would be reading a great deal into the Eighth Amendment to hold that the punishments authorized by legislatures cannot constitutionally reflect a retributive purpose.

The less esoteric but no less controversial question is whether the death penalty acts as a superior deterrent. Those favoring abolition find no evidence that it does.[21] Those favoring retention start from the intuitive notion that capital punishment should act as the most effective deterrent and note that there is no convincing evidence that it does not.[22] Escape from this empirical stalemate is sought by placing the burden of proof on the States and concluding that they have failed to demonstrate that capital punishment is a more effective deterrent than life imprisonment. Numerous justifications have been advanced for shifting the burden, and they

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[20] See Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401 (1958); H. Packer, The Limits of the Criminal Sanction 37–39 (1968); M. Cohen, Reason and Law 41–44 (1950); Report of Royal Commission on Capital Punishment, 1949–1953, Cmd. 8932, ¶ 52, pp. 17–18 (1953); Hart, Murder and the Principles of Punishment: England and the United States, 52 Nw. U. L. Rev. 433, 446–455 (1957); H. L. A. Hart, Law, Liberty and Morality 60–69 (1963).

[21] See, *e. g.*, Sellin, Homicides in Retentionist and Abolitionist States, in Capital Punishment 135 *et seq.* (T. Sellin ed. 1967); Schuessler, The Deterrent Influence of the Death Penalty, 284 Annals 54 (1952).

[22] See, *e. g.*, Hoover, Statements in Favor of the Death Penalty, in H. Bedau, The Death Penalty in America 130 (1967 rev. ed.); Allen, Capital Punishment: Your Protection and Mine, in The Death Penalty in America, *supra*, at 135. See also Hart, 52 Nw. U. L. Rev. *supra*, at 457; Bedau, The Death Penalty in America, *supra*, at 265–266.

are not without their rhetorical appeal. However, these arguments are not descended from established constitutional principles, but are born of the urge to bypass an unresolved factual question.[23] Comparative deterrence is not a matter that lends itself to precise measurement; to shift the burden to the States is to provide an illusory solution to an enormously complex problem. If it were proper to put the States to the test of demonstrating the deterrent value of capital punishment, we could just as well ask them to prove the need for life imprisonment or any other punishment. Yet I know of no convincing evidence that life imprisonment is a more effective deterrent than 20 years' imprisonment, or even that a $10 parking ticket is a more effective deterrent than a $5 parking ticket. In fact, there are some who go so far as to challenge the notion that any punishments deter crime.[24] If the States are unable to adduce convincing proof rebutting such assertions, does it then follow that all punishments are suspect as being "cruel and unusual" within the meaning of the Constitution? On the contrary, I submit that the questions raised by the necessity approach are beyond the pale of judicial inquiry under the Eighth Amendment.

V

Today the Court has not ruled that capital punishment is *per se* violative of the Eighth Amendment; nor has it ruled that the punishment is barred for any particular class or classes of crimes. The substantially similar concurring opinions of MR. JUSTICE STEWART and MR. JUSTICE WHITE, which are necessary to support the judgment setting aside petitioners' sentences, stop

[23] See *Powell* v. *Texas*, 392 U. S. 514, 531 (1968) (MARSHALL, J.) (plurality opinion).

[24] See, *e. g.*, K. Menninger, The Crime of Punishment 206–208 (1968).

short of reaching the ultimate question. The actual scope of the Court's ruling, which I take to be embodied in these concurring opinions, is not entirely clear. This much, however, seems apparent: if the legislatures are to continue to authorize capital punishment for some crimes, juries and judges can no longer be permitted to make the sentencing determination in the same manner they have in the past.[25] This approach—not urged in oral arguments or briefs—misconceives the nature of the constitutional command against "cruel and unusual punishments," disregards controlling case law, and demands a rigidity in capital cases which, if possible of achievement, cannot be regarded as a welcome change. Indeed the contrary seems to be the case.

As I have earlier stated, the Eighth Amendment forbids the imposition of punishments that are so cruel and inhumane as to violate society's standards of civilized conduct. The Amendment does not prohibit all punishments the States are unable to prove necessary to deter or control crime. The Amendment is not concerned with the process by which a State determines that a particular punishment is to be imposed in a particular case. And the Amendment most assuredly does not speak to the power of legislatures to confer sentencing discretion on juries, rather than to fix all sentences by statute.

The critical factor in the concurring opinions of both MR. JUSTICE STEWART and MR. JUSTICE WHITE is the infrequency with which the penalty is imposed. This factor is taken not as evidence of society's abhorrence

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[25] Much in the concurring opinion of MR. JUSTICE DOUGLAS similarly suggests that it is the sentencing system rather than the punishment itself that is constitutionally infirm. However, the opinion also indicates that in the wake of the Court's decision in *McGautha* v. *California*, 402 U. S. 183 (1971), the validity of the sentencing process is no longer open to question.

of capital punishment—the inference that petitioners would have the Court draw—but as the earmark of a deteriorated system of sentencing. It is concluded that petitioners' sentences must be set aside, not because the punishment is impermissibly cruel, but because juries and judges have failed to exercise their sentencing discretion in acceptable fashion.

To be sure, there is a recitation cast in Eighth Amendment terms: petitioners' sentences are "cruel" because they exceed that which the legislatures have deemed necessary for all cases;[26] petitioners' sentences are "unusual" because they exceed that which is imposed in most cases.[27] This application of the words of the Eighth Amendment suggests that capital punishment can be made to satisfy Eighth Amendment values if its rate of imposition is somehow multiplied; it seemingly follows that the flexible sentencing system created by the legislatures, and carried out by juries and judges, has yielded more mercy than the Eighth Amendment can stand. The implications of this approach are mildly ironical. For example, by this measure of the Eighth Amendment, the elimination of death-qualified juries in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), can only be seen in retrospect as a setback to "the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S., at 101.

This novel formulation of Eighth Amendment principles—albeit necessary to satisfy the terms of our limited grant of certiorari—does not lie at the heart of these concurring opinions. The decisive grievance of the opinions—not translated into Eighth Amendment terms—is that the present system of discretionary sentencing

[26] See concurring opinion of MR. JUSTICE STEWART, *ante*, at 309–310; concurring opinion of MR. JUSTICE WHITE, *ante*, at 312.

[27] See concurring opinion of MR. JUSTICE STEWART, *ante*, at 309–310; cf. concurring opinion of MR. JUSTICE WHITE, *ante*, at 312.

in capital cases has failed to produce evenhanded justice; the problem is not that too few have been sentenced to die, but that the selection process has followed no rational pattern.[28] This claim of arbitrariness is not only lacking in empirical support,[29] but also it manifestly fails to establish that the death penalty is a "cruel and unusual" punishment. The Eighth Amendment was included in the Bill of Rights to assure that certain types of punishments would never be imposed, not to channelize the sentencing process. The approach of these concurring opinions has no antecedent in the Eighth Amendment cases. It is essentially and exclusively a procedural due process argument.

This ground of decision is plainly foreclosed as well as misplaced. Only one year ago, in *McGautha* v. *California,* the Court upheld the prevailing system of sentencing in capital cases. The Court concluded:

> "In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." 402 U. S., at 207.

In reaching this decision, the Court had the benefit of extensive briefing, full oral argument, and six months of careful deliberations. The Court's labors are documented by 130 pages of opinions in the United States Reports. All of the arguments and factual contentions accepted

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[28] This point is more heavily emphasized in the opinion of MR. JUSTICE STEWART than in that of MR. JUSTICE WHITE. However, since MR. JUSTICE WHITE allows for statutes providing a mandatory death penalty for "more narrowly defined categories" of crimes, it appears that he, too, is more concerned with a regularized sentencing process, than with the aggregate number of death sentences imposed for all crimes.

[29] See n. 12, *supra.*

in the concurring opinions today were considered and rejected by the Court one year ago. *McGautha* was an exceedingly difficult case, and reasonable men could fairly disagree as to the result. But the Court entered its judgment, and if *stare decisis* means anything, that decision should be regarded as a controlling pronouncement of law.

Although the Court's decision in *McGautha* was technically confined to the dictates of the Due Process Clause of the Fourteenth Amendment, rather than the Eighth Amendment as made applicable to the States through the Due Process Clause of the Fourteenth Amendment, it would be disingenuous to suggest that today's ruling has done anything less than overrule *McGautha* in the guise of an Eighth Amendment adjudication. It may be thought appropriate to subordinate principles of *stare decisis* where the subject is as sensitive as capital punishment and the stakes are so high, but these external considerations were no less weighty last year. This pattern of decisionmaking will do little to inspire confidence in the stability of the law.

While I would not undertake to make a definitive statement as to the parameters of the Court's ruling, it is clear that if state legislatures and the Congress wish to maintain the availability of capital punishment, significant statutory changes will have to be made. Since the two pivotal concurring opinions turn on the assumption that the punishment of death is now meted out in a random and unpredictable manner, legislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed.[30] If such standards can be devised or

[30] It was pointed out in the Court's opinion in *McGautha* that these two alternatives are substantially equivalent. 402 U. S., at 206 n. 16.

the crimes more meticulously defined, the result cannot be detrimental. However, Mr. Justice Harlan's opinion for the Court in *McGautha* convincingly demonstrates that all past efforts "to identify before the fact" the cases in which the penalty is to be imposed have been "uniformly unsuccessful." 402 U. S., at 197. One problem is that "the factors which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a simple formula . . . ." Report of Royal Commission on Capital Punishment, 1949–1953, Cmd. 8932, ¶ 498, p. 174 (1953). As the Court stated in *McGautha,* "[t]he infinite variety of cases and facets to each case would make general standards either meaningless 'boilerplate' or a statement of the obvious that no jury would need." 402 U. S., at 208. But even assuming that suitable guidelines can be established, there is no assurance that sentencing patterns will change so long as juries are possessed of the power to determine the sentence or to bring in a verdict of guilt on a charge carrying a lesser sentence; juries have not been inhibited in the exercise of these powers in the past. Thus, unless the Court in *McGautha* misjudged the experience of history, there is little reason to believe that sentencing standards in any form will substantially alter the discretionary character of the prevailing system of sentencing in capital cases. That system may fall short of perfection, but it is yet to be shown that a different system would produce more satisfactory results.

Real change could clearly be brought about if legislatures provided mandatory death sentences in such a way as to deny juries the opportunity to bring in a verdict on a lesser charge; under such a system, the death sentence could only be avoided by a verdict of acquittal. If this is the only alternative that the legislatures can safely pursue under today's ruling, I would have preferred that the Court opt for total abolition.

It seems remarkable to me that with our basic trust in lay jurors as the keystone in our system of criminal justice, it should now be suggested that we take the most sensitive and important of all decisions away from them. I could more easily be persuaded that mandatory sentences of death, without the intervening and ameliorating impact of lay jurors, are so arbitrary and doctrinaire that they violate the Constitution. The very infrequency of death penalties imposed by jurors attests their cautious and discriminating reservation of that penalty for the most extreme cases. I had thought that nothing was clearer in history, as we noted in *McGautha* one year ago, than the American abhorrence of "the common-law rule imposing a mandatory death sentence on all convicted murderers." 402 U. S., at 198. As the concurring opinion of MR. JUSTICE MARSHALL shows, *ante*, at 339, the 19th century movement away from mandatory death sentences marked an enlightened introduction of flexibility into the sentencing process. It recognized that individual culpability is not always measured by the category of the crime committed. This change in sentencing practice was greeted by the Court as a humanizing development. See *Winston* v. *United States*, 172 U. S. 303 (1899); cf. *Calton* v. *Utah*, 130 U. S. 83 (1889). See also *Andres* v. *United States*, 333 U. S. 740, 753 (1948) (Frankfurter, J., concurring). I do not see how this history can be ignored and how it can be suggested that the Eighth Amendment demands the elimination of the most sensitive feature of the sentencing system.

As a general matter, the evolution of penal concepts in this country has not been marked by great progress, nor have the results up to now been crowned with significant success. If anywhere in the whole spectrum of criminal justice fresh ideas deserve sober analysis, the sentencing and correctional area ranks high on the list. But it has been widely accepted that mandatory sentences for

crimes do not best serve the ends of the criminal justice system. Now, after the long process of drawing away from the blind imposition of uniform sentences for every person convicted of a particular offense, we are confronted with an argument perhaps implying that only the legislatures may determine that a sentence of death is appropriate, without the intervening evaluation of jurors or judges. This approach threatens to turn back the progress of penal reform, which has moved until recently at too slow a rate to absorb significant setbacks.

VI

Since there is no majority of the Court on the ultimate issue presented in these cases, the future of capital punishment in this country has been left in an uncertain limbo. Rather than providing a final and unambiguous answer on the basic constitutional question, the collective impact of the majority's ruling is to demand an undetermined measure of change from the various state legislatures and the Congress. While I cannot endorse the process of decisionmaking that has yielded today's result and the restraints that that result imposes on legislative action, I am not altogether displeased that legislative bodies have been given the opportunity, and indeed unavoidable responsibility, to make a thorough re-evaluation of the entire subject of capital punishment. If today's opinions demonstrate nothing else, they starkly show that this is an area where legislatures can act far more effectively than courts.

The legislatures are free to eliminate capital punishment for specific crimes or to carve out limited exceptions to a general abolition of the penalty, without adherence to the conceptual strictures of the Eighth Amendment. The legislatures can and should make an assessment of the deterrent influence of capital punishment, both generally and as affecting the commission of specific types of

crimes. If legislatures come to doubt the efficacy of capital punishment, they can abolish it, either completely or on a selective basis. If new evidence persuades them that they have acted unwisely, they can reverse their field and reinstate the penalty to the extent it is thought warranted. An Eighth Amendment ruling by judges cannot be made with such flexibility or discriminating precision.

The world-wide trend toward limiting the use of capital punishment, a phenomenon to which we have been urged to give great weight, hardly points the way to a judicial solution in this country under a written Constitution. Rather, the change has generally come about through legislative action, often on a trial basis and with the retention of the penalty for certain limited classes of crimes.[31] Virtually nowhere has change been wrought by so crude a tool as the Eighth Amendment. The complete and unconditional abolition of capital punishment in this country by judicial fiat would have undermined the careful progress of the legislative trend and foreclosed further inquiry on many as yet unanswered questions in this area.

Quite apart from the limitations of the Eighth Amendment itself, the preference for legislative action is justified by the inability of the courts to participate in the

[31] See Patrick, The Status of Capital Punishment: A World Perspective, 56 J. Crim. L. C. & P. S. 397 (1965). In England, for example, 1957 legislation limited capital punishment to murder, treason, piracy with violence, dockyards arson and some military offenses. The Murder (Abolition of Death Penalty) Act 1965 eliminated the penalty for murder on a five-year trial basis. 2 Pub. Gen. Acts, c. 71, p. 1577 (Nov. 8, 1965). This abolition was made permanent in 1969. See 793 Parl. Deb., H. C. (5th ser.) 1294–1298 (1969); 306 Parl. Deb., H. L. (5th ser.) 1317–1322 (1969). Canada has also undertaken limited abolition on a five-year experimental basis. Stats. of Canada 1967–1968, 16 & 17 Eliz. 2, c. 15, p. 145.

debate at the level where the controversy is focused. The case against capital punishment is not the product of legal dialectic, but rests primarily on factual claims, the truth of which cannot be tested by conventional judicial processes. The five opinions in support of the judgments differ in many respects, but they share a willingness to make sweeping factual assertions, unsupported by empirical data, concerning the manner of imposition and effectiveness of capital punishment in this country. Legislatures will have the opportunity to make a more penetrating study of these claims with the familiar and effective tools available to them as they are not to us.

The highest judicial duty is to recognize the limits on judicial power and to permit the democratic processes to deal with matters falling outside of those limits. The "hydraulic pressure[s]" [32] that Holmes spoke of as being generated by cases of great import have propelled the Court to go beyond the limits of judicial power, while fortunately leaving some room for legislative judgment.

MR. JUSTICE BLACKMUN, dissenting.

I join the respective opinions of THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST, and add only the following, somewhat personal, comments.

1. Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. For me, it violates childhood's training and life's experiences, and is not compatible

[32] *Northern Securities Co.* v. *United States*, 193 U. S. 197, 401 (1904) (dissenting opinion).

with the philosophical convictions I have been able to develop. It is antagonistic to any sense of "reverence for life." Were I a legislator, I would vote against the death penalty for the policy reasons argued by counsel for the respective petitioners and expressed and adopted in the several opinions filed by the Justices who vote to reverse these judgments.

2. Having lived for many years in a State that does not have the death penalty,[1] that effectively abolished it in 1911,[2] and that carried out its last execution on February 13, 1906,[3] capital punishment had never been a part of life for me. In my State, it just did not exist. So far as I can determine, the State, purely from a statistical deterrence point of view, was neither the worse nor the better for its abolition, for, as the concurring opinions observe, the statistics prove little, if anything. But the State and its citizens accepted the fact that the death penalty was not to be in the arsenal of possible punishments for any crime.

3. I, perhaps alone among the present members of the Court, am on judicial record as to this. As a member of the United States Court of Appeals, I first struggled silently with the issue of capital punishment in *Feguer* v. *United States,* 302 F. 2d 214 (CA8 1962), cert. denied, 371 U. S. 872 (1962). The defendant in that case may have been one of the last to be executed under federal auspices. I struggled again with the issue, and once more refrained from comment, in my writing for an *en banc* court in *Pope* v. *United States,* 372 F. 2d 710 (CA8 1967), vacated (upon acknowledgment by the Solicitor General of error revealed by the subsequently decided *United States* v. *Jackson,* 390 U. S. 570 (1968)) and remanded, 392 U. S. 651 (1968). Finally, in *Max-*

[1] Minn. Stat. § 609.10 (1971).

[2] Minn. Laws 1911, c. 387.

[3] See W. Trenerry, Murder in Minnesota 163–167 (1962).

well v. *Bishop*, 398 F. 2d 138 (CA8 1968), vacated and remanded, *sua sponte*, by the Court on grounds not raised below, 398 U. S. 262 (1970), I revealed, solitarily and not for the panel, my distress and concern. 398 F. 2d, at 153–154.[4] And in *Jackson* v. *Bishop*, 404 F. 2d 571 (CA8 1968), I had no hesitancy in writing a panel opinion that held the use of the strap by trusties upon fellow Arkansas prisoners to be a violation of the Eighth Amendment. That, however, was in-prison punishment imposed by inmate-foremen.

4. The several concurring opinions acknowledge, as they must, that until today capital punishment was accepted and assumed as not unconstitutional *per se* under the Eighth Amendment or the Fourteenth Amendment. This is either the flat or the implicit holding of a unanimous Court in *Wilkerson* v. *Utah*, 99 U. S. 130, 134–135, in 1879; of a unanimous Court in *In re Kemmler*, 136 U. S. 436, 447, in 1890; of the Court in *Weems* v. *United States*, 217 U. S. 349, in 1910; of all those members of the Court, a majority, who addressed the issue in *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 463–464, 471–472, in 1947; of Mr. Chief Justice Warren, speaking for himself and three others (Justices Black, Doug-

[4] "It is obvious, we think, that the efforts on behalf of Maxwell would not thus be continuing, and his case reappearing in this court were it not for the fact that it is the death penalty, rather than life imprisonment, which he received on his rape conviction. This fact makes the decisional process in a case of this kind particularly excruciating for the author of this opinion [11] who is not personally convinced of the rightness of capital punishment and who questions it as an effective deterrent. But the advisability of capital punishment is a policy matter ordinarily to be resolved by the legislature or through executive clemency and not by the judiciary. We note, for what that notice may be worth, that the death penalty for rape remains available under federal statutes. 18 U. S. C. § 2031; 10 U. S. C. § 920 (a)."

The designated footnote observed that my fellow judges did not join in my comment.

LAS, and Whittaker) in *Trop* v. *Dulles*, 356 U. S. 86, 99, in 1958;[5] in the denial of certiorari in *Rudolph* v. *Alabama*, 375 U. S. 889, in 1963 (where, however, JUSTICES DOUGLAS, BRENNAN, and Goldberg would have heard argument with respect to the imposition of the ultimate penalty on a convicted rapist who had "neither taken nor endangered human life"); and of Mr. Justice Black in *McGautha* v. *California*, 402 U. S. 183, 226, decided only last Term on May 3, 1971.[6]

Suddenly, however, the course of decision is now the opposite way, with the Court evidently persuaded that somehow the passage of time has taken us to a place of greater maturity and outlook. The argument, plausible and high-sounding as it may be, is not persuasive, for it is only one year since *McGautha*, only eight and one-half years since *Rudolph*, 14 years since *Trop*, and 25 years since *Francis*, and we have been presented with nothing that demonstrates a significant movement of any kind in these brief periods. The Court has just decided that it is time to strike down the death penalty. There would have been as much reason to do this

[5] "At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. . . ."

[6] "The Eighth Amendment forbids 'cruel and unusual punishments.' In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable to me that the framers intended to end capital punishment by the Amendment. Although some people have urged that this Court should amend the Constitution by interpretation to keep it abreast of modern ideas, I have never believed that lifetime judges in our system have any such legislative power."

when any of the cited cases were decided. But the Court refrained from that action on each of those occasions.

The Court has recognized, and I certainly subscribe to the proposition, that the Cruel and Unusual Punishments Clause "may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems* v. *United States*, 217 U. S., at 378. And Mr. Chief Justice Warren, for a plurality of the Court, referred to "the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S., at 101. Mr. Jefferson expressed the same thought well.[7]

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[7] "Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and this they would say themselves, were they to rise from the dead. . . . I know . . . that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors. . . . Let us follow no such examples, nor weakly believe that one generation is not as capable as another of taking care of itself, and of ordering its own affairs. Let us, as our sister States have done, avail ourselves of our reason and experience, to correct the crude essays of our first and unexperienced, although wise, virtuous, and well-meaning councils. And lastly, let us provide in our Constitution for its revision at stated periods." Letter to Samuel Kercheval, July 12, 1816, 15 The Writings of Thomas Jefferson 40–42 (Memorial ed. 1904).

My problem, however, as I have indicated, is the suddenness of the Court's perception of progress in the human attitude since decisions of only a short while ago.

5. To reverse the judgments in these cases is, of course, the easy choice. It is easier to strike the balance in favor of life and against death. It is comforting to relax in the thoughts—perhaps the rationalizations—that this is the compassionate decision for a maturing society; that this is the moral and the "right" thing to do; that thereby we convince ourselves that we are moving down the road toward human decency; that we value life even though that life has taken another or others or has grievously scarred another or others and their families; and that we are less barbaric than we were in 1879, or in 1890, or in 1910, or in 1947, or in 1958, or in 1963, or a year ago, in 1971, when *Wilkerson, Kemmler, Weems, Francis, Trop, Rudolph,* and *McGautha* were respectively decided.

This, for me, is good argument, and it makes some sense. But it is good argument and it makes sense only in a legislative and executive way and not as a judicial expedient. As I have said above, were I a legislator, I would do all I could to sponsor and to vote for legislation abolishing the death penalty. And were I the chief executive of a sovereign State, I would be sorely tempted to exercise executive clemency as Governor Rockefeller of Arkansas did recently just before he departed from office. There—on the Legislative Branch of the State or Federal Government, and secondarily, on the Executive Branch—is where the authority and responsibility for this kind of action lies. The authority should not be taken over by the judiciary in the modern guise of an Eighth Amendment issue.

I do not sit on these cases, however, as a legislator, responsive, at least in part, to the will of constituents.

Our task here, as must so frequently be emphasized and re-emphasized, is to pass upon the constitutionality of legislation that has been enacted and that is challenged. This is the sole task for judges. We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great. In fact, as today's decision reveals, they are almost irresistible.

6. The Court, in my view, is somewhat propelled toward its result by the interim decision of the California Supreme Court, with one justice dissenting, that the death penalty is violative of that State's constitution. *People* v. *Anderson*, 6 Cal. 3d 628, 493 P. 2d 880 (Feb. 18, 1972). So far as I am aware, that was the first time the death penalty in its entirety has been nullified by judicial decision. Cf. *Ralph* v. *Warden*, 438 F. 2d 786, 793 (CA4 1970), cert. denied, *post*, p. 942. California's moral problem was a profound one, for more prisoners were on death row there than in any other State. California, of course, has the right to construe its constitution as it will. Its construction, however, is hardly a precedent for federal adjudication.

7. I trust the Court fully appreciates what it is doing when it decides these cases the way it does today. Not only are the capital punishment laws of 39 States and the District of Columbia struck down, but also all those provisions of the federal statutory structure that permit the death penalty apparently are voided. No longer is capital punishment possible, I suspect, for, among other crimes, treason, 18 U. S. C. § 2381; or assassination of the President, the Vice President, or those who stand elected to those positions, 18 U. S. C. § 1751; or assassination of a Member or member-elect of Congress, 18 U. S. C. § 351; or espionage, 18 U. S. C. § 794;

or rape within the special maritime jurisdiction, 18 U. S. C. § 2031; or aircraft or motor vehicle destruction where death occurs, 18 U. S. C. § 34; or explosives offenses where death results, 18 U. S. C. §§ 844 (d) and (f); or train wrecking, 18 U. S. C. § 1992; or aircraft piracy, 49 U. S. C. § 1472 (i). Also in jeopardy, perhaps, are the death penalty provisions in various Articles of the Uniform Code of Military Justice. 10 U. S. C. §§ 885, 890, 894, 899, 901, 904, 906, 913, 918, and 920. All these seem now to be discarded without a passing reference to the reasons, or the circumstances, that prompted their enactment, some very recent, and their retention in the face of efforts to repeal them.

8. It is of passing interest to note a few voting facts with respect to recent federal death penalty legislation:

A. The aircraft piracy statute, 49 U. S. C. § 1472 (i), was enacted September 5, 1961. The Senate vote on August 10 was 92–0. It was announced that Senators Chavez, Fulbright, Neuberger, and Symington were absent but that, if present, all four would vote yea. It was also announced, on the other side of the aisle, that Senator Butler was ill and that Senators Beall, Carlson, and Morton were absent or detained, but that those four, if present, would vote in the affirmative. These announcements, therefore, indicate that the true vote was 100–0. 107 Cong. Rec. 15440. The House passed the bill without recorded vote. 107 Cong. Rec. 16849.

B. The presidential assassination statute, 18 U. S. C. § 1751, was approved August 28, 1965, without recorded votes. 111 Cong. Rec. 14103, 18026, and 20239.

C. The Omnibus Crime Control Act of 1970 was approved January 2, 1971. Title IV thereof added the congressional assassination statute that is now 18 U. S. C. § 351. The recorded House vote on October 7, 1970, was 341–26, with 63 not voting and 62 of those paired. 116 Cong. Rec. 35363–35364. The Senate vote on October 8

was 59–0, with 41 not voting, but with 21 of these announced as favoring the bill. 116 Cong. Rec. 35743. Final votes after conference were not recorded. 116 Cong. Rec. 42150, 42199.

It is impossible for me to believe that the many lawyer-members of the House and Senate—including, I might add, outstanding leaders and prominent candidates for higher office—were callously unaware and insensitive of constitutional overtones in legislation of this type. The answer, of course, is that in 1961, in 1965, and in 1970 these elected representatives of the people—far more conscious of the temper of the times, of the maturing of society, and of the contemporary demands for man's dignity, than are we who sit cloistered on this Court—took it as settled that the death penalty then, as it always had been, was not in itself unconstitutional. Some of those Members of Congress, I suspect, will be surprised at this Court's giant stride today.

9. If the reservations expressed by my Brother STEWART (which, as I read his opinion, my Brother WHITE shares) were to command support, namely, that capital punishment may not be unconstitutional so long as it be mandatorily imposed, the result, I fear, will be that statutes struck down today will be re-enacted by state legislatures to prescribe the death penalty for specified crimes without any alternative for the imposition of a lesser punishment in the discretion of the judge or jury, as the case may be. This approach, it seems to me, encourages legislation that is regressive and of an antique mold, for it eliminates the element of mercy in the imposition of punishment. I thought we had passed beyond that point in our criminology long ago.

10. It is not without interest, also, to note that, although the several concurring opinions acknowledge the heinous and atrocious character of the offenses committed by the petitioners, none of those opinions makes

reference to the misery the petitioners' crimes occasioned to the victims, to the families of the victims, and to the communities where the offenses took place. The arguments for the respective petitioners, particularly the oral arguments, were similarly and curiously devoid of reference to the victims. There is risk, of course, in a comment such as this, for it opens one to the charge of emphasizing the retributive. But see *Williams* v. *New York*, 337 U. S. 241, 248 (1949). Nevertheless, these cases are here because offenses to innocent victims were perpetrated. This fact, and the terror that occasioned it, and the fear that stalks the streets of many of our cities today perhaps deserve not to be entirely overlooked. Let us hope that, with the Court's decision, the terror imposed will be forgotten by those upon whom it was visited, and that our society will reap the hoped-for benefits of magnanimity.

Although personally I may rejoice at the Court's result, I find it difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement. I fear the Court has overstepped. It has sought and has achieved an end.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join, dissenting.

The Court granted certiorari in these cases to consider whether the death penalty is any longer a permissible form of punishment. 403 U. S. 952 (1971). It is the judgment of five Justices that the death penalty, as customarily prescribed and implemented in this country today, offends the constitutional prohibition against cruel and unusual punishments. The reasons for that judgment are stated in five separate opinions, expressing as many separate rationales. In my view, none of these opinions provides a constitutionally adequate foundation for the Court's decision.

MR. JUSTICE DOUGLAS concludes that capital punishment is incompatible with notions of "equal protection" that he finds to be "implicit" in the Eighth Amendment. *Ante*, at 257. MR. JUSTICE BRENNAN bases his judgment primarily on the thesis that the penalty "does not comport with human dignity." *Ante*, at 270. MR. JUSTICE STEWART concludes that the penalty is applied in a "wanton" and "freakish" manner. *Ante*, at 310. For MR. JUSTICE WHITE it is the "infrequency" with which the penalty is imposed that renders its use unconstitutional. *Ante*, at 313. MR. JUSTICE MARSHALL finds that capital punishment is an impermissible form of punishment because it is "morally unacceptable" and "excessive." *Ante*, at 360, 358.

Although the central theme of petitioners' presentations in these cases is that the imposition of the death penalty is *per se* unconstitutional, only two of today's opinions explicitly conclude that so sweeping a determination is mandated by the Constitution. Both MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL call for the abolition of all existing state and federal capital punishment statutes. They intimate as well that no capital statute could be devised in the future that might comport with the Eighth Amendment. While the practical consequences of the other three opinions are less certain, they at least do not purport to render impermissible every possible statutory scheme for the use of capital punishment that legislatures might hereafter devise.[1] Insofar as these latter opinions fail, at least ex-

[1] MR. JUSTICE DOUGLAS holds only that "the Eighth Amendment [requires] legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and [requires] judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups." *Ante*, at 256. The import of this rationale is that while all existing laws must fall, it remains theoretically possible for a State or Congress to devise a statute capable of withstanding a claim of discriminatory application. MR. JUSTICE STEWART, in

plicitly, to go as far as petitioners' contentions would carry them, their reservations are attributable to a willingness to accept only a portion of petitioners' thesis. For the reasons cogently set out in the CHIEF JUSTICE's dissenting opinion (*ante*, at 396–403), and for reasons stated elsewhere in this opinion, I find my Brothers' less-than-absolute-abolition judgments unpersuasive. Because those judgments are, for me, not dispositive, I shall focus primarily on the broader ground upon which the petitions in these cases are premised. The foundations of my disagreement with that broader thesis are equally applicable to each of the concurring opinions. I will, therefore, not endeavor to treat each one separately. Nor will I attempt to predict what forms of capital statutes, if any, may avoid condemnation in the future under the variety of views expressed by the collective majority today. That difficult task, not performed in any of the controlling opinions, must go unanswered until other cases presenting these more limited inquiries arise.

Whatever uncertainties may hereafter surface, several of the consequences of today's decision are unmistakably clear. The decision is plainly one of the greatest im-

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addition to reserving judgment on at least four presently existing statutes (*ante*, at 307), indicates that statutes making capital punishment mandatory for any category of crime, or providing some other means of assuring against "wanton" and "freakish" application (*ante*, at 310), would present a difficult question that he does not reach today. MR. JUSTICE WHITE, for somewhat different reasons, appears to come to the conclusion that a mandatory system of punishment might prove acceptable. *Ante*, p. 310.

The brief and selective references, in my opinion above and in this note, to the opinions of other Justices obviously do not adequately summarize the thoughtful and scholarly views set forth in their full opinions. I have tried merely to select what seem to me to be the respective points of primary emphasis in each of the majority's opinions.

portance. The Court's judgment removes the death sentences previously imposed on some 600 persons awaiting punishment in state and federal prisons throughout the country. At least for the present, it also bars the States and the Federal Government from seeking sentences of death for defendants awaiting trial on charges for which capital punishment was heretofore a potential alternative. The happy event for these countable few constitutes, however, only the most visible consequence of this decision. Less measurable, but certainly of no less significance, is the shattering effect this collection of views has on the root principles of *stare decisis*, federalism, judicial restraint and—most importantly—separation of powers.

The Court rejects as not decisive the clearest evidence that the Framers of the Constitution and the authors of the Fourteenth Amendment believed that those documents posed no barrier to the death penalty. The Court also brushes aside an unbroken line of precedent reaffirming the heretofore virtually unquestioned constitutionality of capital punishment. Because of the pervasiveness of the constitutional ruling sought by petitioners, and accepted in varying degrees by five members of the Court, today's departure from established precedent invalidates a staggering number of state and federal laws. The capital punishment laws of no less than 39 States [2] and the District of Columbia are nullified. In addition, numerous provisions of the Criminal Code of the United States and of the Uniform Code of Mili-

[2] While statutes in 40 States permit capital punishment for a variety of crimes, the constitutionality of a very few mandatory statutes remains undecided. See concurring opinions by MR. JUSTICE STEWART and MR. JUSTICE WHITE. Since Rhode Island's only capital statute—murder by a life term prisoner—is mandatory, no law in that State is struck down by virtue of the Court's decision today.

tary Justice also are voided. The Court's judgment not only wipes out laws presently in existence, but denies to Congress and to the legislatures of the 50 States the power to adopt new policies contrary to the policy selected by the Court. Indeed, it is the view of two of my Brothers that the people of each State must be denied the prerogative to amend their constitutions to provide for capital punishment even selectively for the most heinous crime.

In terms of the constitutional role of this Court, the impact of the majority's ruling is all the greater because the decision encroaches upon an area squarely within the historic prerogative of the legislative branch—both state and federal—to protect the citizenry through the designation of penalties for prohibitable conduct. It is the very sort of judgment that the legislative branch is competent to make and for which the judiciary is ill-equipped. Throughout our history, Justices of this Court have emphasized the gravity of decisions invalidating legislative judgments, admonishing the nine men who sit on this bench of the duty of self-restraint, especially when called upon to apply the expansive due process and cruel and unusual punishment rubrics. I can recall no case in which, in the name of deciding constitutional questions, this Court has subordinated national and local democratic processes to such an extent. Before turning to address the thesis of petitioners' case against capital punishment—a thesis that has proved, at least in large measure, persuasive to a majority of this Court—I first will set out the principles that counsel against the Court's sweeping decision.

I

The Constitution itself poses the first obstacle to petitioners' argument that capital punishment is *per se* unconstitutional. The relevant provisions are the Fifth,

Eighth, and Fourteenth Amendments. The first of these provides in part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law . . . ."

Thus, the Federal Government's power was restricted in order to guarantee those charged with crimes that the prosecution would have only a single opportunity to seek imposition of the death penalty and that the death penalty could not be exacted without due process and a grand jury indictment. The Fourteenth Amendment, adopted about 77 years after the Bill of Rights, imposed the due process limitation of the Fifth Amendment upon the States' power to authorize capital punishment.

The Eighth Amendment, adopted at the same time as the Fifth, proscribes "cruel and unusual" punishments. In an effort to discern its meaning, much has been written about its history in the opinions of this Court and elsewhere.[3] That history need not be restated here since, whatever punishments the Framers of the Constitution may have intended to prohibit under the "cruel and unusual" language, there cannot be the slightest doubt that they intended no absolute bar on the Government's authority to impose the death penalty. *McGautha* v.

[3] For a thorough presentation of the history of the Cruel and Unusual Punishment Clause see MR. JUSTICE MARSHALL'S opinion today, *ante*, at 316–328. See also *Weems* v. *United States*, 217 U. S. 349, 389–409 (1910) (White, J., dissenting); *O'Neil* v. *Vermont*, 144 U. S. 323, 337 (1892) (Field, J., dissenting); Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839 (1969).

California, 402 U. S. 183, 226 (1971) (separate opinion of Black, J.). As much is made clear by the three references to capital punishment in the Fifth Amendment. Indeed, the same body that proposed the Eighth Amendment also provided, in the first Crimes Act of 1790, for the death penalty for a number of offenses. 1 Stat. 112.

Of course, the specific prohibitions within the Bill of Rights are limitations on the exercise of power; they are not an affirmative grant of power to the Government. I, therefore, do not read the several references to capital punishment as foreclosing this Court from considering whether the death penalty in a particular case offends the Eighth and Fourteenth Amendments. Nor are "cruel and unusual punishments" and "due process of law" static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and to gain meaning through application to specific circumstances, many of which were not contemplated by their authors. While flexibility in the application of these broad concepts is one of the hallmarks of our system of government, the Court is not free to read into the Constitution a meaning that is plainly at variance with its language. Both the language of the Fifth and Fourteenth Amendments and the history of the Eighth Amendment confirm beyond doubt that the death penalty was considered to be a constitutionally permissible punishment. It is, however, within the historic process of constitutional adjudication to challenge the imposition of the death penalty in some barbaric manner or as a penalty wholly disproportionate to a particular criminal act. And in making such a judgment in a case before it, a court may consider contemporary standards to the extent they are relevant. While this weighing of a punishment against the Eighth Amendment standard on a case-by-case basis is consonant with history and precedent, it is not what

petitioners demand in these cases. They seek nothing less than the total abolition of capital punishment by judicial fiat.

II

Petitioners assert that the constitutional issue is an open one uncontrolled by prior decisions of this Court. They view the several cases decided under the Eighth Amendment as assuming the constitutionality of the death penalty without focusing squarely upon the issue. I do not believe that the case law can be so easily cast aside. The Court on numerous occasions has both assumed and asserted the constitutionality of capital punishment. In several cases that assumption provided a necessary foundation for the decision, as the issue was whether a particular means of carrying out a capital sentence would be allowed to stand. Each of those decisions necessarily was premised on the assumption that some method of exacting the penalty was permissible.

The issue in the first capital case in which the Eighth Amendment was invoked, *Wilkerson* v. *Utah*, 99 U. S. 130 (1879), was whether carrying out a death sentence by public shooting was cruel and unusual punishment. A unanimous Court upheld that form of execution, noting first that the punishment itself, as distinguished from the mode of its infliction, was "not pretended by the counsel of the prisoner" (*id.*, at 137) to be cruel and unusual. The Court went on to hold that:

> "Cruel and unusual punishments are forbidden by the Constitution, but the authorities . . . are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category . . . ." *Id.*, at 134–135.

Eleven years later, in *In re Kemmler*, 136 U. S. 436 (1890), the Court again faced a question involving the

method of carrying out a capital sentence. On review of a denial of habeas corpus relief by the Supreme Court of New York, this Court was called on to decide whether electrocution, which only very recently had been adopted by the New York Legislature as a means of execution, was impermissibly cruel and unusual in violation of the Fourteenth Amendment.[4] Chief Justice Fuller, speaking for the entire Court, ruled in favor of the State. Electrocution had been selected by the legislature, after careful investigation, as "the most humane and practical method known to modern science of carrying into effect the sentence of death." *Id.*, at 444. The Court drew a clear line between the penalty itself and the mode of its execution:

> "Punishments are cruel when they involve torture or a lingering death; but the punishment of death

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[4] The Court pointed out that the Eighth Amendment applied only to the Federal Government and not to the States. The Court's power in relation to state action was limited to protecting privileges and immunities and to assuring due process of law, both within the Fourteenth Amendment. The standard—for purposes of due process—was held to be whether the State had exerted its authority, "within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." 136 U. S., at 448. The State of Georgia, in No. 69–5003 and No. 69–5030, has placed great emphasis on this discussion in *In re Kemmler*, 136 U. S. 436 (1890), and has urged that the instant cases should all be decided under the more expansive tests of due process rather than under the Cruel and Unusual Punishments Clause *per se*. Irrespective whether the decisions of this Court are viewed as "incorporating" the Eighth Amendment (see *Robinson* v. *California*, 370 U. S. 660 (1962); *Powell* v. *Texas*, 392 U. S. 514 (1968)), it seems clear that the tests for applying these two provisions are fundamentally identical. Compare Mr. Justice Frankfurter's test in *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 470 (1947) (concurring opinion), with Mr. Chief Justice Warren's test in *Trop* v. *Dulles*, 356 U. S. 86, 100–101 (1958).

> is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." *Id.*, at 447.

More than 50 years later, in *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459 (1947), the Court considered a case in which, due to a mechanical malfunction, Louisiana's initial attempt to electrocute a convicted murderer had failed. Petitioner sought to block a second attempt to execute the sentence on the ground that to do so would constitute cruel and unusual punishment. In the plurality opinion written by Mr. Justice Reed, concurred in by Chief Justice Vinson and Justices Black and Jackson, relief was denied. Again the Court focused on the manner of execution, never questioning the propriety of the death sentence itself.

> "The case before us does not call for an examination into any punishments except that of death. . . . The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. . . .
>
> ". . . The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." *Id.*, at 463–464.

Mr. Justice Frankfurter, unwilling to dispose of the case under the Eighth Amendment's specific prohibition, approved the second execution attempt under the Due Process Clause. He concluded that "a State may be found to deny a person due process by treating even one guilty of crime in a manner that violates standards of

decency more or less universally accepted though not when it treats him by a mode about which opinion is fairly divided." *Id.*, at 469–470.

The four dissenting Justices, although finding a second attempt at execution to be impermissibly cruel, expressly recognized the validity of capital punishment:

> "In determining whether the proposed procedure is unconstitutional, we must measure it against a lawful electrocution. . . . Electrocution, when instantaneous, *can* be inflicted by a state in conformity with due process of law. . . .
>
> "The all-important consideration is that the execution shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death itself." *Id.*, at 474 (original emphasis).

Each of these cases involved the affirmance of a death sentence where its validity was attacked as violating the Eighth Amendment. Five opinions were written in these three cases, expressing the views of 23 Justices. While in the narrowest sense it is correct to say that in none was there a frontal attack upon the constitutionality of the death penalty, each opinion went well beyond an unarticulated assumption of validity. The power of the States to impose capital punishment was repeatedly and expressly recognized.

In addition to these cases in which the constitutionality of the death penalty was a necessary foundation for the decision, those who today would have this Court undertake the absolute abolition of the death penalty also must reject the opinions of other cases stipulating or assuming the constitutionality of capital punishment. *Trop* v. *Dulles*, 356 U. S. 86, 99, 100 (1958); *Weems* v. *United States*, 217 U. S. 349, 382, 409 (1910)

(White, J., joined by Holmes, J., dissenting).[5] See also *McGautha* v. *California,* 402 U. S., at 226 (separate opinion of Black, J.); *Robinson* v. *California,* 370 U. S. 660, 676 (1962) (DOUGLAS, J., concurring).

The plurality opinion in *Trop* v. *Dulles, supra,* is of special interest since it is this opinion, in large measure, that provides the foundation for the present attack on the death penalty.[6] It is anomalous that the standard urged by petitioners—"evolving standards of decency that mark the progress of a maturing society" (356 U. S., at 101)—should be derived from an opinion that so unqualifiedly rejects their arguments. Chief Justice Warren, joined by Justices Black, DOUGLAS, and Whittaker, stated flatly:

> "At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty." *Id.,* at 99.

The issue in *Trop* was whether forfeiture of citizenship was a cruel and unusual punishment when imposed on

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[5] Mr. Justice White stated:

"Death was a well-known method of punishment prescribed by law, and it was of course painful, and in that sense was cruel. But the infliction of this punishment was clearly not prohibited by the word cruel, although that word manifestly was intended to forbid the resort to barbarous and unnecessary methods of bodily torture, in executing even the penalty of death." 217 U. S., at 409.

[6] See Part III, *infra.*

a wartime deserter who had gone "over the hill" for less than a day and had willingly surrendered. In examining the consequences of the relatively novel punishment of denationalization,[7] Chief Justice Warren drew a line between "traditional" and "unusual" penalties:

> "While the State has the power to punish, the [Eighth] Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect." *Id.*, at 100.

The plurality's repeated disclaimers of any attack on capital punishment itself must be viewed as more than offhand dicta since those views were written in direct response to the strong language in Mr. Justice Frankfurter's dissent arguing that denationalization could not be a disproportionate penalty for a concededly capital offense.[8]

The most recent precedents of this Court—*Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), and *McGautha* v. *California*, *supra*—are also premised to a significant degree on the constitutionality of the death penalty. While the scope of review in both cases was limited to questions involving the procedures for selecting juries

[7] In footnote 32, at 100–101, the plurality opinion indicates that denationalization "was never explicitly sanctioned by this Government until 1940 and never tested against the Constitution until this day."

[8] "It seems scarcely arguable that loss of citizenship is within the Eighth Amendment's prohibition because disproportionate to an offense that is capital and has been so from the first year of Independence. . . . Is constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death?" *Id.*, at 125.

and regulating their deliberations in capital cases,[9] those opinions were "singularly academic exercise[s]" [10] if the members of this Court were prepared at those times to find in the Constitution the complete prohibition of the death penalty. This is especially true of Mr. Justice Harlan's opinion for the Court in *McGautha*, in which, after a full review of the history of capital punishment, he concluded that "we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." *Id.*, at 207.[11]

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[9] 398 U. S. 936 (1970); 402 U. S., at 306 (BRENNAN, J., dissenting). While the constitutionality *per se* of capital punishment has been assumed almost without question, recently members of this Court have expressed the desire to consider the constitutionality of the death penalty with respect to its imposition for specific crimes. *Rudolph* v. *Alabama*, 375 U. S. 889 (1963) (dissent from the denial of certiorari).

[10] Brief for Respondent in *Branch* v. *Texas*, No. 69–5031, p. 6.

[11] While the implicit assumption in *McGautha* v. *California*, 402 U. S. 183 (1971), of the acceptability of death as a form of punishment must prove troublesome for those who urge total abolition, it presents an even more severe problem of *stare decisis* for those Justices who treat the Eighth Amendment essentially as a *process* prohibition. MR. JUSTICE DOUGLAS, while stating that the Court is "now imprisoned in . . . *McGautha*" (*ante*, at 248), concludes that capital punishment is unacceptable precisely because the procedure governing its imposition is arbitrary and discriminatory. MR. JUSTICE STEWART, taking a not dissimilar tack on the merits, disposes of *McGautha* in a footnote reference indicating that it is not applicable because the question there arose under the Due Process Clause. *Ante*, at 310 n. 12. MR. JUSTICE WHITE, who also finds the death penalty intolerable because of the process for its implementation, makes no attempt to distinguish *McGautha*'s clear holding. For the reasons expressed in the CHIEF JUSTICE's opinion, *McGautha* simply cannot be distinguished. *Ante*, at 399–403. These various opinions would, in fact, overrule that recent precedent.

Perhaps enough has been said to demonstrate the unswerving position that this Court has taken in opinions spanning the last hundred years. On virtually every occasion that any opinion has touched on the question of the constitutionality of the death penalty, it has been asserted affirmatively, or tacitly assumed, that the Constitution does not prohibit the penalty. No Justice of the Court, until today, has dissented from this consistent reading of the Constitution. The petitioners in these cases now before the Court cannot fairly avoid the weight of this substantial body of precedent merely by asserting that there is no prior decision precisely in point. *Stare decisis*, if it is a doctrine founded on principle, surely applies where there exists a long line of cases endorsing or necessarily assuming the validity of a particular matter of constitutional interpretation. *Green* v. *United States*, 356 U. S. 165, 189–193 (1958) (Frankfurter, J., concurring). While these oft-repeated expressions of unchallenged belief in the constitutionality of capital punishment may not justify a summary disposition of the constitutional question before us, they are views expressed and joined in over the years by no less than 29 Justices of this Court and therefore merit the greatest respect.[12] Those who now resolve to set those views aside indeed have a heavy burden.

III

Petitioners seek to avoid the authority of the foregoing cases, and the weight of express recognition in the Constitution itself, by reasoning which will not withstand analysis. The thesis of petitioners' case derives from several opinions in which members of this Court

[12] This number includes all the Justices who participated in *Wilkerson* v. *Utah*, 99 U. S. 130 (1879), *Kemmler*, and *Louisiana ex rel. Francis* as well as those who joined in the plurality and dissenting opinions in *Trop* and the dissenting opinion in *Weems*.

have recognized the dynamic nature of the prohibition against cruel and unusual punishments. The final meaning of those words was not set in 1791. Rather, to use the words of Chief Justice Warren speaking for a plurality of the Court in *Trop* v. *Dulles*, 356 U. S., at 100–101:

> "[T]he words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

But this was not new doctrine. It was the approach to the Eighth Amendment taken by Mr. Justice McKenna in his opinion for the Court in *Weems* v. *United States*, 217 U. S. 349 (1910). Writing for four Justices sitting as the majority of the six-man Court deciding the case, he concluded that the clause must be "progressive"; it is not "fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.*, at 378. The same test was offered by Mr. Justice Frankfurter in his separate concurrence in *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S., at 469. While he rejected the notion that the Fourteenth Amendment made the Eighth Amendment fully applicable to the States, he nonetheless found as a matter of due process that the States were prohibited from "treating even one guilty of crime in a manner that violates standards of decency more or less universally accepted."

Whether one views the question as one of due process or of cruel and unusual punishment, as I do for convenience in this case, the issue is essentially the same.[13] The fundamental premise upon which either standard is based is that notions of what constitutes cruel and unusual punishment or due process do evolve.

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[13] See n. 4, *supra*.

Neither the Congress nor any state legislature would today tolerate pillorying, branding, or cropping or nailing of the ears—punishments that were in existence during our colonial era.[14] Should, however, any such punishment be prescribed, the courts would certainly enjoin its execution. See *Jackson* v. *Bishop,* 404 F. 2d 571 (CA8 1968). Likewise, no court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives. Similarly, there may well be a process of evolving attitude with respect to the application of the death sentence for particular crimes.[15] See *McGautha* v. *California,* 402 U. S., at 242 (DOUGLAS, J., dissenting).

But we are not asked to consider the permissibility of any of the several methods employed in carrying out the death sentence. Nor are we asked, at least as part of the core submission in these cases, to determine whether the penalty might be a grossly excessive punishment for some specific criminal conduct. Either inquiry would call for a discriminating evaluation of particular means, or of the relationship between particular conduct and its punishment. Petitioners' principal argument goes far beyond the traditional process of case-by-case inclusion and exclusion. Instead the argument insists on an unprecedented constitutional rule of absolute prohibition of capital punishment for any crime, regardless of its depravity and impact on society. In calling for a precipitate and final judicial end to this form of penalty as offensive to evolving standards of decency, petitioners would have this Court abandon the traditional and more refined approach consistently followed in its prior Eighth Amendment precedents. What they are saying, in effect, is that the evolutionary

[14] See, *e. g., Ex parte Wilson,* 114 U. S. 417, 427–428 (1885).

[15] See Part VII, *infra.*

process has come suddenly to an end; that the ultimate wisdom as to the appropriateness of capital punishment under all circumstances, and for all future generations, has somehow been revealed.

The prior opinions of this Court point with great clarity to reasons why those of us who sit on this Court at a particular time should act with restraint before assuming, contrary to a century of precedent, that we now know the answer for all time to come. First, where as here, the language of the applicable provision provides great leeway and where the underlying social policies are felt to be of vital importance, the temptation to read personal preference into the Constitution is understandably great. It is too easy to propound our subjective standards of wise policy under the rubric of more or less universally held standards of decency. See *Trop* v. *Dulles,* 356 U. S., at 103 (Warren, C. J.), 119–120 (Frankfurter, J., dissenting); *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S., at 470–471 (Frankfurter, J., concurring); *Weems* v. *United States,* 217 U. S., at 378–379 (McKenna, J.).

The second consideration dictating judicial self-restraint arises from a proper recognition of the respective roles of the legislative and judicial branches. The designation of punishments for crimes is a matter peculiarly within the sphere of the state and federal legislative bodies. See, *e. g., In re Kemmler,* 136 U. S., at 447; *Trop* v. *Dulles,* 356 U. S., at 103. When asked to encroach on the legislative prerogative we are well counseled to proceed with the utmost reticence. The review of legislative choices, in the performance of our duty to enforce the Constitution, has been characterized most appropriately by Mr. Justice Holmes as "the gravest and most delicate duty that this Court is called on to perform." *Blodgett* v. *Holden,* 275 U. S. 142, 147–148 (1927) (separate opinion).

How much graver is that duty when we are not asked to pass on the constitutionality of a single penalty under the facts of a single case but instead are urged to overturn the legislative judgments of 40 state legislatures as well as those of Congress. In so doing is the majority able to claim, as did the Court in *Weems*, that it appreciates "to the fullest the wide range of power that the legislature possesses to adapt its penal laws to conditions as they may exist and punish the crimes of men according to their forms and frequency"? 217 U. S., at 379. I think not. No more eloquent statement of the essential separation of powers limitation on our prerogative can be found than the admonition of Mr. Justice Frankfurter, dissenting in *Trop*. His articulation of the traditional view takes on added significance where the Court undertakes to nullify the legislative judgments of the Congress and four-fifths of the States.

> "What is always basic when the power of Congress to enact legislation is challenged is the appropriate approach to judicial review of congressional legislation . . . . When the power of Congress to pass a statute is challenged, the function of this Court is to determine whether legislative action lies clearly outside the constitutional grant of power to which it has been, or may fairly be, referred. In making this determination, the Court sits in judgment on the action of a co-ordinate branch of the Government while keeping unto itself—as it must under our constitutional system—the final determination of its own power to act. . . .
>
> "Rigorous observance of the difference between limits of power and wise exercise of power—between questions of authority and questions of prudence—requires the most alert appreciation of this decisive but subtle relationship of two concepts that too easily coalesce. No less does it require a

> disciplined will to adhere to the difference. It is not easy to stand aloof and allow want of wisdom to prevail, to disregard one's own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the Executive Branch do." 356 U. S., at 119–120.

See also Mr. Justice White's dissenting opinion in *Weems* v. *United States*, 217 U. S., at 382.

IV

Although determining the range of available punishments for a particular crime is a legislative function, the very presence of the Cruel and Unusual Punishments Clause within the Bill of Rights requires, in the context of a specific case, that courts decide whether particular acts of the Congress offend that Amendment. The Due Process Clause of the Fourteenth Amendment imposes on the judiciary a similar obligation to scrutinize state legislation. But the proper exercise of that constitutional obligation in the cases before us today must be founded on a full recognition of the several considerations set forth above—the affirmative references to capital punishment in the Constitution, the prevailing precedents of this Court, the limitations on the exercise of our power imposed by tested principles of judicial self-restraint, and the duty to avoid encroachment on the powers conferred upon state and federal legislatures. In the face of these considerations, only the most con-

clusive of objective demonstrations could warrant this Court in holding capital punishment *per se* unconstitutional. The burden of seeking so sweeping a decision against such formidable obstacles is almost insuperable. Viewed from this perspective, as I believe it must be, the case against the death penalty falls far short.

Petitioners' contentions are premised, as indicated above, on the long-accepted view that concepts embodied in the Eighth and Fourteenth Amendments evolve. They present, with skill and persistence, a list of "objective indicators" which are said to demonstrate that prevailing standards of human decency have progressed to the final point of requiring the Court to hold, for all cases and for all time, that capital punishment is unconstitutional.

Briefly summarized, these proffered indicia of contemporary standards of decency include the following: (i) a worldwide trend toward the disuse of the death penalty; [16] (ii) the reflection in the scholarly literature of a progressive rejection of capital punishment founded essentially on moral opposition to such treatment; [17] (iii) the decreasing numbers of executions over the last 40 years and especially over the last decade; [18] (iv) the

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[16] See, *e. g.*, T. Sellin, The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute (1959); United Nations, Department of Economic and Social Affairs, Capital Punishment (1968); 2 National Commission on Reform of Federal Criminal Laws, Working Papers, 1351 n. 13 (1970).

[17] The literature on the moral question is legion. Representative collections of the strongly held views on both sides may be found in H. Bedau, The Death Penalty in America (1967 rev. ed.), and in Royal Commission on Capital Punishment, Minutes of Evidence (1949–1953).

[18] Department of Justice, National Prisoner Statistics No. 46, Capital Punishment 1930–1970 (Aug. 1971) (191 executions during the 1960's; no executions since June 2, 1967); President's Commission on Law Enforcement and Administration of Justice, The Chal-

small number of death sentences rendered in relation to the number of cases in which they might have been imposed; [19] and (v) the indication of public abhorrence of

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lenge of Crime in a Free Society 143 (1967) ("[t]he most salient characteristic of capital punishment is that it is infrequently applied").

Petitioners concede, as they must, that little weight can be given to the lack of executions in recent years. A *de facto* moratorium has existed for five years now while cases challenging the procedures for implementing the capital sentence have been re-examined by this Court. *McGautha* v. *California*, 402 U. S. 183 (1971); *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968). The infrequency of executions during the years before the moratorium became fully effective may be attributable in part to decisions of this Court giving expanded scope to the criminal procedural protections of the Bill of Rights, especially under the Fourth and Fifth Amendments. *E. g.*, *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *Mapp* v. *Ohio*, 367 U. S. 643 (1961). Additionally, decisions of the early 1960's amplifying the scope of the federal habeas corpus remedy also may help account for a reduction in the number of executions. *E. g.*, *Fay* v. *Noia*, 372 U. S. 391 (1963); *Townsend* v. *Sain*, 372 U. S. 293 (1963). The major effect of either expanded procedural protections or extended collateral remedies may well have been simply to postpone the date of execution for some capital offenders, thereby leaving them ultimately in the moratorium limbo.

[19] An exact figure for the number of death sentences imposed by the sentencing authorities—judge or jury—in the various jurisdictions is difficult to determine. But the National Prisoner Statistics (hereafter NPS) show the numbers of persons received at the state and federal prisons under sentence of death. This number, however, does not account for those who may have been sentenced and retained in local facilities during the pendency of their appeals. Accepting with this reservation the NPS figures as a minimum, the most recent statistics show that at least 1,057 persons were sentenced to death during the decade of the 1960's. NPS, *supra*, n. 18, at 9.

No fully reliable statistics are available on the nationwide ratio of death sentences to cases in which death was a statutorily permissible punishment. At oral argument, counsel for petitioner in No. 69–5003 estimated that the ratio is 12 or 13 to one. Tr. of Oral Arg. in *Furman* v. *Georgia*, No. 69–5003, p. 11. Others have found a higher correlation. See McGee, Capital Punishment as

the penalty reflected in the circumstance that executions are no longer public affairs.[20] The foregoing is an incomplete summary but it touches the major bases of petitioners' presentation. Although they are not appropriate for consideration as objective evidence, petitioners strongly urge two additional propositions. They contend, first, that the penalty survives public condemnation only through the infrequency, arbitrariness, and discriminatory nature of its application, and, second, that there no longer exists any legitimate justification for the utilization of the ultimate penalty. These contentions, which have proved persuasive to several of the Justices constituting the majority, deserve separate consideration and will be considered in the ensuing sections. Before turning to those arguments, I first address the argument based on "objective" factors.

Any attempt to discern contemporary standards of decency through the review of objective factors must take into account several overriding considerations which petitioners choose to discount or ignore. In a democracy

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Seen by a Correctional Administrator, 28 Fed. Prob., No. 2, pp. 11, 12 (1964) (one out of every five, or 20%, of persons convicted of murder received the death penalty in California); Bedau, Death Sentences in New Jersey 1907–1960, 19 Rutgers L. Rev. 1 (1964) (between 1916 and 1955, 157 out of 652 persons charged with murder received the death sentence in New Jersey—about 20%; between 1956 and 1960, 13 out of 61 received the death sentence—also about 20%); H. Kalven & H. Ziesel, The American Jury 435–436 (1966) (21 of 111 murder cases resulted in death sentences during three representative years during the mid-1950's); see also Koeninger, Capital Punishment in Texas, 1924–1968, 15 Crime & Delin. 132 (1969).

[20] See, *e. g.*, *People* v. *Anderson*, 6 Cal. 3d 628, 493 P. 2d 880, cert. denied, 406 U. S. 958 (1972); Goldberg & Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv. L. Rev. 1773, 1783 (1970). But see F. Frankfurter, Of Law and Men 97–98 (1956) (reprint of testimony before the Royal Commission on Capital Punishment).

the first indicator of the public's attitude must always be found in the legislative judgments of the people's chosen representatives. MR. JUSTICE MARSHALL's opinion today catalogues the salient statistics. Forty States,[21] the District of Columbia, and the Federal Government still authorize the death penalty for a wide variety of crimes. That number has remained relatively static since the end of World War I. *Ante*, at 339–341. That does not mean, however, that capital punishment has become a forgotten issue in the legislative arena. As recently as January, 1971, Congress approved the death penalty for congressional assassination. 18 U. S. C. § 351. In 1965 Congress added the death penalty for presidential and vice presidential assassinations. 18 U. S. C. § 1751. Additionally, the aircraft piracy statute passed in 1961 also carries the death penalty. 49 U. S. C. § 1472 (i). MR. JUSTICE BLACKMUN's dissenting opinion catalogues the impressive ease with which each of these statutes was approved. *Ante*, at 412–413. On the converse side, a bill proposing the abolition of capital punishment for all federal crimes was introduced in 1967 but failed to reach the Senate floor.[22]

At the state level, New York, among other States, has recently undertaken reconsideration of its capital crimes. A law passed in 1965 restricted the use of capital punishment to the crimes of murder of a police officer and murder by a person serving a sentence of life imprisonment. N. Y. Penal Code § 125.30 (1967).

I pause here to state that I am at a loss to under-

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[21] Nine States have abolished capital punishment without resort to the courts. See H. Bedau, *supra*, n. 17, at 39. California has been the only State to abolish capital punishment judicially. *People* v. *Anderson*, *supra*.

[22] Hearings on S. 1760 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 2d Sess. (1968).

stand how those urging this Court to pursue a course of *absolute* abolition as a matter of constitutional judgment can draw any support from the New York experience. As is also the case with respect to recent legislative activity in Canada [23] and Great Britain,[24] New York's decision to restrict the availability of the death penalty is a product of refined and discriminating legislative judgment, reflecting, not the total rejection of capital punishment as inherently cruel, but a desire to limit it to those circumstances in which legislative judgment deems retention to be in the public interest. No such legislative flexibility is permitted by the contrary course petitioners urge this Court to follow.[25]

In addition to the New York experience, a number of other States have undertaken reconsideration of capital punishment in recent years. In four States the penalty has been put to a vote of the people through public referenda—a means likely to supply objective evidence of community standards. In Oregon a referendum seeking abolition of capital punishment failed in 1958 but was subsequently approved in 1964.[26] Two years later the penalty was approved in Colorado by a wide margin.[27]

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[23] Canada has recently undertaken a five-year experiment—similar to that conducted in England—abolishing the death penalty for most crimes. Stats. of Canada 1967–1968, 16 & 17 Eliz. 2, c. 15, p. 145. However, capital punishment is still prescribed for some crimes, including murder of a police officer or corrections official, treason, and piracy.

[24] Great Britain, after many years of controversy over the death penalty, undertook a five-year experiment in abolition in 1965. Murder (Abolition of Death Penalty) Act 1965, 2 Pub. Gen. Acts, c. 71, p. 1577. Although abolition for murder became final in 1969, the penalty was retained for several crimes, including treason, piracy, and dockyards arson.

[25] See n. 62, *infra*.

[26] See Bedau, *supra*, n. 17, at 233.

[27] *Ibid.* (approximately 65% of the voters approved the death penalty).

In Massachusetts in 1968, in an advisory referendum, the voters there likewise recommended retention of the penalty. In 1970, approximately 64% of the voters in Illinois approved the penalty.[28] In addition, the National Commission on Reform of Federal Criminal Laws reports that legislative committees in Massachusetts, Pennsylvania, and Maryland recommended abolition, while committees in New Jersey and Florida recommended retention.[29] The legislative views of other States have been summarized by Professor Hugo Bedau in his compilation of sources on capital punishment entitled The Death Penalty in America:

> "What our legislative representatives think in the two score states which still have the death penalty may be inferred from the fate of the bills to repeal or modify the death penalty filed during recent years in the legislatures of more than half of these states. In about a dozen instances, the bills emerged from committee for a vote. But in none except Delaware did they become law. In those states where these bills were brought to the floor of the legislatures, the vote in most instances wasn't even close." [30]

This recent history of activity with respect to legislation concerning the death penalty abundantly refutes the abolitionist position.

The second and even more direct source of information

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[28] See Bedau, The Death Penalty in America, 35 Fed. Prob., No. 2, pp. 32, 34 (1971).

[29] National Commission, *supra*, n. 16, at 1365.

[30] Bedau, *supra*, n. 17, at 232. See, *e. g.*, *State* v. *Davis*, 158 Conn. 341, 356–359, 260 A. 2d 587, 595–596 (1969), in which the Connecticut Supreme Court pointed out that the state legislature had considered the question of abolition during the 1961, 1963, 1965, 1967, and 1969 sessions and had "specifically declined to abolish the death penalty" every time.

reflecting the public's attitude toward capital punishment is the jury. In *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), MR. JUSTICE STEWART, joined by JUSTICES BRENNAN and MARSHALL, characterized the jury's historic function in the sentencing process in the following terms:

> "[T]he jury is given broad discretion to decide whether or not death *is* 'the proper penalty' in a given case, and a juror's general views about capital punishment play an inevitable role in any such decision.
>
> "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. . . . Guided by neither rule nor standard, . . . a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death."
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> "[O]ne of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.' *Trop* v. *Dulles*, . . ." [31]

Any attempt to discern, therefore, where the prevailing standards of decency lie must take careful account of

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[31] 391 U. S., at 519 and n. 15. See also *McGautha* v. *California*, 402 U. S., at 201–202; *Williams* v. *New York*, 337 U. S. 241, 253 (1949) (Murphy, J., dissenting) ("[i]n our criminal courts the jury sits as the representative of the community"); W. Douglas, We the Judges 389 (1956); Holmes, Law in Science and Science in Law, 12 Harv. L. Rev. 443, 460 (1899).

the jury's response to the question of capital punishment. During the 1960's juries returned in excess of a thousand death sentences, a rate of approximately two per week. Whether it is true that death sentences were returned in less than 10% of the cases as petitioners estimate or whether some higher percentage is more accurate,[32] these totals simply do not support petitioners' assertion at oral argument that "the death penalty is virtually unanimously repudiated and condemned by the conscience of contemporary society." [33] It is also worthy of note that the annual rate of death sentences has remained relatively constant over the last 10 years and that the figure for 1970—127 sentences—is the highest annual total since 1961.[34] It is true that the sentencing rate might be expected to rise, rather than remain constant, when the number of violent crimes increases as it has in this country.[35] And it may be conceded that the constancy in these statistics indicates the unwillingness of juries to demand the ultimate penalty in many cases where it might be imposed. But these considerations fall short of indicating that juries are imposing the death penalty with such rarity as to justify this Court in reading into this circumstance a public rejection of capital punishment.[36]

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[32] See n. 19, *supra*.

[33] Tr. of Oral Arg. in *Aikens* v. *California*, No. 68–5027, p. 21. Although the petition for certiorari in this case was dismissed after oral argument, *Aikens* v. *California*, 406 U. S. 813 (1972), the same counsel argued both this case and *Furman*. He stated at the outset that his argument was equally applicable to each case.

[34] National Prisoner Statistics, *supra*, n. 18.

[35] FBI, Uniform Crime Reports—1970, pp. 7–14 (1971).

[36] Public opinion polls, while of little probative relevance, corroborate substantially the conclusion derived from examining legislative activity and jury sentencing—opinion on capital punishment is "fairly divided." *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S., at 470 (Frankfurter, J., concurring). See, *e. g.*, *Witherspoon* v.

One must conclude, contrary to petitioners' submission, that the indicators most likely to reflect the public's view—legislative bodies, state referenda and the juries which have the actual responsibility—do not support the contention that evolving standards of decency require total abolition of capital punishment.[37] Indeed,

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Illinois, 391 U. S., at 520 n. 16 (1966 poll finding 42% in favor of the death penalty and 47% opposed); Goldberg & Dershowitz, *supra*, n. 20, at 1781 n. 39 (1969 poll shows 51% in favor of retention—the same percentage as in 1960); H. Bedau, The Death Penalty in America 231–241 (1967 rev. ed.); Bedau, The Death Penalty in America, 35 Fed. Prob., No. 2, pp. 32, 34–35 (1971).

[37] If, as petitioners suggest, the judicial branch itself reflects the prevailing standards of human decency in our society, it may be relevant to note the conclusion reached by state courts in recent years on the question of the acceptability of capital punishment. In the last five years alone, since the *de facto* "moratorium" on executions began (see n. 18, *supra*), the appellate courts of 26 States have passed on the constitutionality of the death penalty under the Eighth Amendment and under similar provisions of most state constitutions. Every court, except the California Supreme Court, *People* v. *Anderson*, 6 Cal. 3d 628, 493 P. 2d 880, cert. denied, 406 U. S. 958 (1972), has found the penalty to be constitutional. Those States, and the year of the most recent decision on the issue, are: Alabama (1971); Arizona (1969); Colorado (1967); Connecticut (1969); Delaware (1971); Florida (1969); Georgia (1971); Illinois (1970); Kansas (1968); Kentucky (1971); Louisiana (1971); Maryland (1971); Missouri (1971); Nebraska (1967); Nevada (1970); New Jersey (1971); New Mexico (1969); North Carolina (1972); Ohio (1971); Oklahoma (1971); South Carolina (1970); Texas (1971); Utah (1969); Virginia (1971); Washington (1971). While the majority of these state court opinions do not give the issue more than summary exposition, many have considered the question at some length, and, indeed, some have considered the issue under the "evolving standards" rubric. See, *e. g.*, *State* v. *Davis*, 158 Conn. 341, 356–359, 260 A. 2d 587, 595–596 (1969); *State* v. *Crook*, 253 La. 961, 967–970, 221 So. 2d 473, 475–476 (1969); *Bartholomey* v. *State*, 260 Md. 504, 273 A. 2d 164 (1971); *State* v. *Alvarez*, 182 Neb. 358, 366–367, 154 N. W. 2d 746, 751–752 (1967); *State* v. *Pace*, 80 N. M. 364, 371–372, 456 P. 2d 197,

the weight of the evidence indicates that the public generally has not accepted either the morality or the social merit of the views so passionately advocated by the articulate spokesmen for abolition. But however one may assess the amorphous ebb and flow of public opinion generally on this volatile issue, this type of inquiry lies at the periphery—not the core—of the judicial process in constitutional cases. The assessment of popular opinion is essentially a legislative, not a judicial, function.

V

Petitioners seek to salvage their thesis by arguing that the infrequency and discriminatory nature of the actual resort to the ultimate penalty tend to diffuse public opposition. We are told that the penalty is imposed exclusively on uninfluential minorities—"the poor and powerless, personally ugly and socially unacceptable." [38] It is urged that this pattern of application assures that large segments of the public will be either uninformed or unconcerned and will have no reason to measure the punishment against prevailing moral standards.

Implicitly, this argument concedes the unsoundness of petitioners' contention, examined above under Part IV, that objective evidence shows a present and widespread community rejection of the death penalty. It is now said,

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204–205 (1969). Every federal court that has passed on the issue has ruled that the death penalty is not *per se* unconstitutional. See, *e. g.*, *Ralph* v. *Warden*, 438 F. 2d 786, 793 (CA4 1970); *Jackson* v. *Dickson*, 325 F. 2d 573, 575 (CA9 1963), cert. denied, 377 U. S. 957 (1964).

[38] Brief for Petitioner in No. 68–5027, p. 51. Although the *Aikens* case is no longer before us (see n. 33, *supra*), the petitioners in *Furman* and *Jackson* have incorporated petitioner's brief in *Aikens* by reference. See Brief for Petitioner in No. 69–5003, pp. 11–12; Brief for Petitioner in No. 69–5030, pp. 11–12.

in effect, not that capital punishment presently offends our citizenry, but that the public *would* be offended *if* the penalty were enforced in a nondiscriminatory manner against a significant percentage of those charged with capital crimes, and *if* the public were thereby made aware of the moral issues surrounding capital punishment. Rather than merely registering the objective indicators on a judicial balance, we are asked ultimately to rest a far-reaching constitutional determination on a prediction regarding the subjective judgments of the mass of our people under hypothetical assumptions that may or may not be realistic.

Apart from the impermissibility of basing a constitutional judgment of this magnitude on such speculative assumptions, the argument suffers from other defects. If, as petitioners urge, we are to engage in speculation, it is not at all certain that the public would experience deep-felt revulsion if the States were to execute as many sentenced capital offenders this year as they executed in the mid-1930's.[39] It seems more likely that public reaction, rather than being characterized by undifferentiated rejection, would depend upon the facts and circumstances surrounding each particular case.

Members of this Court know, from the petitions and appeals that come before us regularly, that brutish and revolting murders continue to occur with disquieting frequency. Indeed, murders are so commonplace

[39] In 1935 available statistics indicate that 184 convicted murderers were executed. That is the highest annual total for any year since statistics have become available. NPS, *supra*, n. 18. The year 1935 is chosen by petitioners in stating their thesis:

"If, in fact, 184 murderers were to be executed in this year 1971, we submit it is palpable that the public conscience of the Nation would be profoundly and fundamentally revolted, and that the death penalty for murder would be abolished forthwith as the atavistic horror that it is." Brief for Petitioner in No. 68–5027, p. 26 (see n. 38, *supra*).

in our society that only the most sensational receive significant and sustained publicity. It could hardly be suggested that in any of these highly publicized murder cases—the several senseless assassinations or the too numerous shocking multiple murders that have stained this country's recent history—the public has exhibited any signs of "revulsion" at the thought of executing the convicted murderers. The public outcry, as we all know, has been quite to the contrary. Furthermore, there is little reason to suspect that the public's reaction would differ significantly in response to other less publicized murders. It is certainly arguable that many such murders, because of their senselessness or barbarousness, would evoke a public demand for the death penalty rather than a public rejection of that alternative. Nor is there any rational basis for arguing that the public reaction to any of these crimes would be muted if the murderer were "rich and powerful." The demand for the ultimate sanction might well be greater, as a wealthy killer is hardly a sympathetic figure. While there might be specific cases in which capital punishment would be regarded as excessive and shocking to the conscience of the community, it can hardly be argued that the public's dissatisfaction with the penalty in particular cases would translate into a demand for absolute abolition.

In pursuing the foregoing speculation, I do not suggest that it is relevant to the appropriate disposition of these cases. The purpose of the digression is to indicate that judicial decisions cannot be founded on such speculations and assumptions, however appealing they may seem.

But the discrimination argument does not rest alone on a projection of the assumed effect on public opinion of more frequent executions. Much also is made of the undeniable fact that the death penalty has a greater impact on the lower economic strata of society, which

include a relatively higher percentage of persons of minority racial and ethnic group backgrounds. The argument drawn from this fact is two-pronged. In part it is merely an extension of the speculative approach pursued by petitioners, *i. e.*, that public revulsion is suppressed in callous apathy because the penalty does not affect persons from the white middle class which constitutes the majority in this country. This aspect, however, adds little to the infrequency rationalization for public apathy which I have found unpersuasive.

As MR. JUSTICE MARSHALL'S opinion today demonstrates, the argument does have a more troubling aspect. It is his contention that if the average citizen were aware of the disproportionate burden of capital punishment borne by the "poor, the ignorant, and the underprivileged," he would find the penalty "shocking to his conscience and sense of justice" and would not stand for its further use. *Ante*, at 365–366, 369. This argument, like the apathy rationale, calls for further speculation on the part of the Court. It also illuminates the quicksands upon which we are asked to base this decision. Indeed, the two contentions seem to require contradictory assumptions regarding the public's moral attitude toward capital punishment. The apathy argument is predicated on the assumption that the penalty is used against the less influential elements of society, that the public is fully aware of this, and that it tolerates use of capital punishment only because of a callous indifference to the offenders who are sentenced. MR. JUSTICE MARSHALL'S argument, on the other hand, rests on the contrary assumption that the public does not know against whom the penalty is enforced and that if the public were educated to this fact it would find the punishment intolerable. *Ante*, at 369. Neither assumption can claim to be an entirely accurate portrayal of public attitude; for some acceptance of capital punishment might be a conse-

quence of hardened apathy based on the knowledge of infrequent and uneven application, while for others acceptance may grow only out of ignorance. More significantly, however, neither supposition acknowledges what, for me, is a more basic flaw.

Certainly the claim is justified that this criminal sanction falls more heavily on the relatively impoverished and underprivileged elements of society. The "have-nots" in every society always have been subject to greater pressure to commit crimes and to fewer constraints than their more affluent fellow citizens. This is, indeed, a tragic byproduct of social and economic deprivation, but it is not an argument of constitutional proportions under the Eighth or Fourteenth Amendment. The same discriminatory impact argument could be made with equal force and logic with respect to those sentenced to prison terms. The Due Process Clause admits of no distinction between the deprivation of "life" and the deprivation of "liberty." If discriminatory impact renders capital punishment cruel and unusual, it likewise renders invalid most of the prescribed penalties for crimes of violence. The root causes of the higher incidence of criminal penalties on "minorities and the poor" will not be cured by abolishing the system of penalties. Nor, indeed, could any society have a viable system of criminal justice if sanctions were abolished or ameliorated because most of those who commit crimes happen to be underprivileged. The basic problem results not from the penalties imposed for criminal conduct but from social and economic factors that have plagued humanity since the beginning of recorded history, frustrating all efforts to create in any country at any time the perfect society in which there are no "poor," no "minorities" and no "underprivileged." [40]

[40] Not all murders, and certainly not all crimes, are committed by persons classifiable as "underprivileged." Many crimes of violence

The causes underlying this problem are unrelated to the constitutional issue before the Court.

Finally, yet another theory for abolishing the death penalty—reflected in varying degrees in each of the concurring opinions today—is predicated on the discriminatory impact argument. Quite apart from measuring the public's acceptance or rejection of the death penalty under the "standards of decency" rationale, MR. JUSTICE DOUGLAS finds the punishment cruel and unusual because it is "arbitrarily" invoked. He finds that "the basic theme of equal protection is implicit" in the Eighth Amendment, and that the Amendment is violated when jury sentencing may be characterized as arbitrary or discriminatory. *Ante*, at 249. While MR. JUSTICE STEWART does not purport to rely on notions of equal protection, he also rests primarily on what he views to be a history of arbitrariness. *Ante*, at 309–310.[41] Whatever may be the facts with respect to jury sentencing, this argument calls for a reconsideration of the "standards" aspects of the Court's decision in *McGautha* v. *California*, 402 U. S. 183 (1971). Although that is the unmistakable thrust of these opinions today, I see no reason to reassess the standards question considered so carefully in Mr. Justice Harlan's opinion for the Court

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are committed by professional criminals who willingly choose to prey upon society as an easy and remunerative way of life. Moreover, the terms "underprivileged," the "poor" and the "powerless" are relative and inexact, often conveying subjective connotations which vary widely depending upon the viewpoint and purpose of the user.

[41] Similarly, MR. JUSTICE WHITE exhibits concern for a lack of any "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Ante*, at 313. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL treat the arbitrariness question in the same manner that it is handled by petitioners—as an element of the approach calling for total abolition.

last Term. Having so recently reaffirmed our historic dedication to entrusting the sentencing function to the jury's "untrammeled discretion" (*id.*, at 207), it is difficult to see how the Court can now hold the entire process constitutionally defective under the Eighth Amendment. For all of these reasons I find little merit in the various discrimination arguments, at least in the several lights in which they have been cast in these cases.

Although not presented by any of the petitioners today, a different argument, premised on the Equal Protection Clause, might well be made. If a Negro defendant, for instance, could demonstrate that members of his race were being singled out for more severe punishment than others charged with the same offense, a constitutional violation might be established. This was the contention made in *Maxwell* v. *Bishop*, 398 F. 2d 138 (CA8 1968), vacated and remanded on other grounds, 398 U. S. 262 (1970), in which the Eighth Circuit was asked to issue a writ of habeas corpus setting aside a death sentence imposed on a Negro defendant convicted of rape. In that case substantial statistical evidence was introduced tending to show a pronounced disproportion in the number of Negroes receiving death sentences for rape in parts of Arkansas and elsewhere in the South. That evidence was not excluded but was found to be insufficient to show discrimination in sentencing in Maxwell's trial. MR. JUSTICE BLACKMUN, then sitting on the Court of Appeals for the Eighth Circuit, concluded:

> "The petitioner's argument is an interesting one and we are not disposed to say that it could not have some validity and weight in certain situations. Like the trial court, however . . . we feel that the argument does not have validity and pertinent application to Maxwell's case.
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> . . . .

> "We are not yet ready to condemn and upset the result reached in every case of a Negro rape defendant in the State of Arkansas on the basis of broad theories of social and statistical injustice. . . .
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> . . . . .
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> "We do not say that there is no ground for suspicion that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it. There are recognizable indicators of this. But . . . improper state practice of the past does not automatically invalidate a procedure of the present. . . ." *Id.*, at 146–148.

I agree that discriminatory application of the death penalty in the past, admittedly indefensible, is no justification for holding today that capital punishment is invalid in all cases in which sentences were handed out to members of the class discriminated against. But *Maxwell* does point the way to a means of raising the equal protection challenge that is more consonant with precedent and the Constitution's mandates than the several courses pursued by today's concurring opinions.

A final comment on the racial discrimination problem seems appropriate. The possibility of racial bias in the trial and sentencing process has diminished in recent years. The segregation of our society in decades past, which contributed substantially to the severity of punishment for interracial crimes, is now no longer prevalent in this country. Likewise, the day is past when juries do not represent the minority group elements of the community. The assurance of fair trials for all citizens is greater today than at any previous time in our history. Because standards of criminal justice have "evolved" in a manner favorable to the accused, discriminatory imposition of capital punishment is far less likely today than in the past.

VI

Petitioner in *Branch* v. *Texas,* No. 69–5031, and to a lesser extent the petitioners in the other cases before us today, urge that capital punishment is cruel and unusual because it no longer serves any rational legislative interests. Before turning to consider whether any of the traditional aims of punishment justify the death penalty, I should make clear the context in which I approach this aspect of the cases.

First, I find no support—in the language of the Constitution, in its history, or in the cases arising under it—for the view that this Court may invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology. While the cases affirm our authority to prohibit punishments that are cruelly inhumane (*e. g., Wilkerson* v. *Utah,* 99 U. S., at 135–136; *In re Kemmler,* 136 U. S., at 447), and punishments that are cruelly excessive in that they are disproportionate to particular crimes (see Part VII, *infra*), the precedents of this Court afford no basis for striking down a particular form of punishment because we may be persuaded that means less stringent would be equally efficacious.

Secondly, if we were free to question the justifications for the use of capital punishment, a heavy burden would rest on those who attack the legislatures' judgments to prove the lack of rational justifications. This Court has long held that legislative decisions in this area, which lie within the special competency of that branch, are entitled to a presumption of validity. See, *e. g., Trop* v. *Dulles,* 356 U. S., at 103; *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S., at 470 (Frankfurter, J., concurring); *Weems* v. *United States,* 217 U. S., at 378–379; *In re Kemmler,* 136 U. S., at 449.

I come now to consider, subject to the reservations above expressed, the two justifications most often cited for the retention of capital punishment. The concept of retribution—though popular for centuries—is now criticized as unworthy of a civilized people. Yet this Court has acknowledged the existence of a retributive element in criminal sanctions and has never heretofore found it impermissible. In *Williams* v. *New York*, 337 U. S. 241 (1949), Mr. Justice Black stated that,

> "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." *Id.*, at 248.

It is clear, however, that the Court did not reject retribution altogether. The record in that case indicated that one of the reasons why the trial judge imposed the death penalty was his sense of revulsion at the "shocking details of the crime." *Id.*, at 244. Although his motivation was clearly retributive, the Court upheld the trial judge's sentence.[42] Similarly, MR. JUSTICE MARSHALL noted in his plurality opinion in *Powell* v. *Texas*, 392 U. S. 514, 530 (1968), that this Court "has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects." [43]

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[42] In *Morissette* v. *United States*, 342 U. S. 246 (1952), Mr. Justice Jackson spoke of the "tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution." *Id.*, at 251. He also noted that the penalties for invasions of the rights of property are high as a consequence of the "public demand for retribution." *Id.*, at 260.

[43] See also *Massiah* v. *United States*, 377 U. S. 201, 207 (1964) (WHITE, J., dissenting) (noting the existence of a "profound dispute about whether we should punish, deter, rehabilitate or cure"); *Robinson* v. *California*, 370 U. S., at 674 (DOUGLAS, J., concurring);

While retribution alone may seem an unworthy justification in a moral sense, its utility in a system of criminal justice requiring public support has long been recognized. Lord Justice Denning, now Master of the Rolls of the Court of Appeal in England, testified on this subject before the British Royal Commission on Capital Punishment:

> "Many are inclined to test the efficacy of punishment solely by its value as a deterrent: but this is too narrow a view. Punishment is the way in which society expresses its denunciation of wrong doing: and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else. If this were so, we should not send to prison a man who was guilty of motor manslaughter, but only disqualify him from driving; but would public opinion be content with this? The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not." [44]

The view expressed by Lord Denning was cited approvingly in the Royal Commission's Report, recognizing "a

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Louisiana ex rel. Francis v. *Resweber*, 329 U. S., at 470–471 (Mr. Justice Frankfurter's admonition that the Court is not empowered to act simply because of a "feeling of revulsion against a State's insistence on its pound of flesh"); *United States* v. *Lovett*, 328 U. S. 303, 324 (1946) (Frankfurter, J., concurring) ("[p]unishment presupposes an offense, not necessarily an act previously declared criminal, but an act for which retribution is exacted").

[44] Royal Commission on Capital Punishment, Minutes of Evidence 207 (1949–1953).

strong and widespread demand for retribution." [45] MR. JUSTICE STEWART makes much the same point in his opinion today when he concludes that expression of man's retributive instincts in the sentencing process "serves an important purpose in promoting the stability of a society governed by law." *Ante*, at 308. The view, moreover, is not without respectable support in the jurisprudential literature in this country,[46] despite a substantial body of opinion to the contrary.[47] And it is conceded on all sides that, not infrequently, cases arise that are so shocking or offensive that the public demands the ultimate penalty for the transgressor.

Deterrence is a more appealing justification, although opinions again differ widely. Indeed, the deterrence issue lies at the heart of much of the debate between the abolitionists and retentionists.[48] Statistical studies, based primarily on trends in States that have abolished the penalty, tend to support the view that the death penalty has not been proved to be a superior deterrent.[49] Some dispute the validity of this conclusion,[50] pointing

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[45] Report of Royal Commission on Capital Punishment, 1949–1953, Cmd. 8932, ¶ 53, p. 18.

[46] M. Cohen, Reason and Law 50 (1950); H. Packer, The Limits of the Criminal Sanction 11–12 (1968); Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401 (1958).

[47] The authorities are collected in Comment, The Death Penalty Cases, 56 Calif. L. Rev. 1268, 1297–1301 (1968). The competing contentions are summarized in the Working Papers of the National Commission on Reform of Federal Criminal Laws, *supra*, n. 16, at 1358–1359. See also the persuasive treatment of this issue by Dr. Karl Menninger in The Crime of Punishment 190–218 (1966).

[48] See, *e. g.*, H. Bedau, The Death Penalty in America 260 (1967 rev. ed.); National Commission, *supra*, n. 16, at 1352.

[49] See Sellin, *supra*, n. 16, at 19–52.

[50] The countervailing considerations, tending to undercut the force of Professor Sellin's statistical studies, are collected in National Commission, *supra*, n. 16, at 1354; Bedau, *supra*, n. 48, at 265–266; Hart, Murder and the Principles of Punishment: England and the United States, 52 Nw. U. L. Rev. 433, 455–460 (1957).

out that the studies do not show that the death penalty has no deterrent effect on any categories of crimes. On the basis of the literature and studies currently available, I find myself in agreement with the conclusions drawn by the Royal Commission following its exhaustive study of this issue:

> "The general conclusion which we reach, after careful review of all the evidence we have been able to obtain as to the deterrent effect of capital punishment, may be stated as follows. *Prima facie* the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment, and there is some evidence (though no convincing statistical evidence) that this is in fact so. But this effect does not operate universally or uniformly, and there are many offenders on whom it is limited and may often be negligible. It is accordingly important to view this question in a just perspective and not base a penal policy in relation to murder on exaggerated estimates of the uniquely deterrent force of the death penalty." [51]

Only recently this Court was called on to consider the deterrence argument in relation to punishment by fines for public drunkenness. *Powell* v. *Texas*, 392 U. S. 514 (1968). The Court was unwilling to strike down the Texas statute on grounds that it lacked a rational foundation. What MR. JUSTICE MARSHALL said there would seem to have equal applicability in this case:

> "The long-standing and still raging debate over the validity of the deterrence justification for penal sanctions has not reached any sufficiently clear conclusions to permit it to be said that such sanctions are ineffective in any particular context or for any

[51] Report of the Royal Commission, *supra*, n. 45, ¶ 68, at 24.

particular group of people who are able to appreciate the consequences of their acts. . . ." *Id.*, at 531.

As I noted at the outset of this section, legislative judgments as to the efficacy of particular punishments are presumptively rational and may not be struck down under the Eighth Amendment because this Court may think that some alternative sanction would be more appropriate. Even if such judgments were within the judicial prerogative, petitioners have failed to show that there exist no justifications for the legislative enactments challenged in these cases.[52] While the evidence and arguments advanced by petitioners might have proved profoundly persuasive if addressed to a legislative body, they do not approach the showing traditionally required before a court declares that the legislature has acted irrationally.

VII

In two of the cases before us today juries imposed sentences of death after convictions for rape.[53] In these cases we are urged to hold that even if capital punishment is permissible for some crimes, it is a cruel and unusual punishment for this crime. Petitioners in these cases rely on the Court's opinions holding that the Eighth Amendment, in addition to prohibiting punishments

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[52] It is worthy of note that the heart of the argument here—that there are no legitimate justifications—was impliedly repudiated last Term by both the majority and dissenting opinions in *McGautha* v. *California*, 402 U. S. 183 (1971). The argument in that case centered on the proposition that due process requires that the standards governing the jury's exercise of its sentencing function be elucidated. As MR. JUSTICE BRENNAN's dissent made clear, whatever standards might be thought to exist arise out of the list of justifications for the death penalty—retribution, deterrence, etc. *Id.*, at 284. If no such standards exist, the controversy last Term was a hollow one indeed.

[53] *Jackson* v. *Georgia*, No. 69–5030; *Branch* v. *Texas*, No. 69–5031.

deemed barbarous and inhumane, also condemns punishments that are greatly disproportionate to the crime charged. This reading of the Amendment was first expressed by Mr. Justice Field in his dissenting opinion in *O'Neil* v. *Vermont*, 144 U. S. 323, 337 (1892), a case in which a defendant charged with a large number of violations of Vermont's liquor laws received a fine in excess of $6,600, or a 54-year jail sentence if the fine was not paid. The majority refused to consider the question on the ground that the Eighth Amendment did not apply to the States. The dissent, after carefully examining the history of that Amendment and the Fourteenth, concluded that its prohibition was binding on Vermont and that it was directed against "all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." *Id.*, at 339–340.[54]

The Court, in *Weems* v. *United States*, 217 U. S. 349 (1910), adopted Mr. Justice Field's view. The defendant, in *Weems*, charged with falsifying Government documents, had been sentenced to serve 15 years in *cadena temporal*, a punishment which included carrying chains at the wrists and ankles and the perpetual loss of the right to vote and hold office. Finding the sentence grossly excessive in length and condition of imprisonment, the Court struck it down. This notion of disproportionality—that particular sentences may be cruelly excessive for particular crimes—has been cited with approval in more recent decisions of this Court. See *Robinson* v. *California*, 370 U. S., at 667; *Trop* v. *Dulles*, 356 U. S., at 100; see also *Howard* v. *Fleming*, 191 U. S. 126, 135–136 (1903).

These cases, while providing a rationale for gauging the constitutionality of capital sentences imposed for rape,

[54] Mr. Justice Harlan, joined by Mr. Justice Brewer, dissented separately but agreed that the State had inflicted a cruel and unusual punishment. *Id.*, at 371.

also indicate the existence of necessary limitations on the judicial function. The use of limiting terms in the various expressions of this test found in the opinions—*grossly* excessive, *greatly* disproportionate—emphasizes that the Court's power to strike down punishments as excessive must be exercised with the greatest circumspection. As I have noted earlier, nothing in the history of the Cruel and Unusual Punishments Clause indicates that it may properly be utilized by the judiciary to strike down punishments—authorized by legislatures and imposed by juries—in any but the extraordinary case. This Court is not empowered to sit as a court of sentencing review, implementing the personal views of its members on the proper role of penology. To do so is to usurp a function committed to the Legislative Branch and beyond the power and competency of this Court.

Operating within these narrow limits, I find it quite impossible to declare the death sentence grossly excessive for all rapes. Rape is widely recognized as among the most serious of violent crimes, as witnessed by the very fact that it is punishable by death in 16 States and by life imprisonment in most other States.[55] The several reasons why rape stands so high on the list of serious crimes are well known: It is widely viewed as the most atrocious of intrusions upon the privacy and dignity of the victim; never is the crime committed accidentally; rarely can it be said to be unpremeditated;

[55] In addition to the States in which rape is a capital offense, statutes in 28 States prescribe life imprisonment as a permissible punishment for at least some category of rape. Also indicative of the seriousness with which the crime of rape is viewed, is the fact that in nine of the 10 States that have abolished death as a punishment for any crime, the maximum term of years for rape is the same as for first-degree murder. Statistical studies have shown that the average prison term served by rapists is longer than for any category of offense other than murder. J. MacDonald, Rape—Offenders and Their Victims 298 (1971).

often the victim suffers serious physical injury; the psychological impact can often be as great as the physical consequences; in a real sense, the threat of both types of injury is always present.[56] For these reasons, and for the reasons arguing against abolition of the death penalty altogether, the excessiveness rationale provides no basis for rejection of the penalty for rape in all cases.

The argument that the death penalty for rape lacks rational justification because less severe punishments might be viewed as accomplishing the proper goals of penology is as inapposite here as it was in considering *per se* abolition. See Part VI *supra*. The state of knowledge with respect to the deterrent value of the sentence for this crime is inconclusive.[57] Moreover, what has been said about the concept of retribution applies with equal force where the crime is rape. There are many cases in which the sordid, heinous nature of a particular crime, demeaning, humiliating, and often physically or psychologically traumatic, will call for public condemnation. In a period in our country's history when the frequency of this crime is increasing alarmingly,[58] it is indeed a grave event for the Court to take from the States whatever deterrent and retributive weight the death penalty retains.

Other less sweeping applications of the disproportionality concept have been suggested. Recently the Fourth Circuit struck down a death sentence in *Ralph* v. *Warden*, 438 F. 2d 786 (1970), holding that the death penalty was an appropriate punishment for rape

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[56] *Id.*, at 63–64; Packer, Making the Punishment Fit the Crime, 77 Harv. L. Rev. 1071, 1077 (1964).

[57] See MacDonald, *supra*, n. 55, at 314; Chambliss, Types of Deviance and the Effectiveness of Legal Sanctions, 1967 Wis. L. Rev. 703.

[58] FBI, Uniform Crime Reports—1970, p. 14 (1971) (during the 1960's the incidence of rape rose 121%).

only where life is "endangered." Chief Judge Haynsworth, who joined in the panel's opinion, wrote separately in denying the State of Maryland's petition for rehearing in order to make clear the basis for his joinder. He stated that, for him, the appropriate test was not whether life was endangered, but whether the victim in fact suffered "grievous physical or psychological harm." *Id.*, at 794. See *Rudolph* v. *Alabama*, 375 U. S. 889 (1963) (dissent from the denial of certiorari).

It seems to me that both of these tests depart from established principles and also raise serious practical problems. How are those cases in which the victim's life is endangered to be distinguished from those in which no danger is found? The threat of serious injury is implicit in the definition of rape; the victim is either forced into submission by physical violence or by the threat of violence. Certainly that test would provide little comfort for either of the rape defendants in the cases presently before us. Both criminal acts were accomplished only after a violent struggle. Petitioner Jackson held a scissors blade against his victim's neck. Petitioner Branch had less difficulty subduing his 65-year-old victim. Both assailants threatened to kill their victims. See MR. JUSTICE DOUGLAS' opinion, *ante*, at 252–253. The alternate test, limiting the penalty to cases in which the victim suffers physical or emotional harm, might present even greater problems of application. While most physical effects may be seen and objectively measured, the emotional impact may be impossible to gauge at any particular point in time. The extent and duration of psychological trauma may not be known or ascertainable prior to the date of trial.

While I reject each of these attempts to establish specific categories of cases in which the death penalty may be deemed excessive, I view them as groping

toward what is for me the appropriate application of the Eighth Amendment. While in my view the disproportionality test may not be used either to strike down the death penalty for rape altogether or to install the Court as a tribunal for sentencing review, that test may find its application in the peculiar circumstances of specific cases. Its utilization should be limited to the rare case in which the death penalty is rendered for a crime technically falling within the legislatively defined class but factually falling outside the likely legislative intent in creating the category. Specific rape cases (and specific homicides as well) can be imagined in which the conduct of the accused would render the ultimate penalty a grossly excessive punishment. Although this case-by-case approach may seem painfully slow and inadequate to those who wish the Court to assume an activist legislative role in reforming criminal punishments, it is the approach dictated both by our prior opinions and by a due recognition of the limitations of judicial power. This approach, rather than the majority's more pervasive and less refined judgment, marks for me the appropriate course under the Eighth Amendment.

VIII

I now return to the overriding question in these cases: whether this Court, acting in conformity with the Constitution, can justify its judgment to abolish capital punishment as heretofore known in this country. It is important to keep in focus the enormity of the step undertaken by the Court today. Not only does it invalidate hundreds of state and federal laws, it deprives those jurisdictions of the power to legislate with respect to capital punishment in the future, except in a manner consistent with the cloudily outlined views of those Justices who do not purport to undertake total abolition.

Nothing short of an amendment to the United States Constitution can reverse the Court's judgments. Meanwhile, all flexibility is foreclosed. The normal democratic process, as well as the opportunities for the several States to respond to the will of their people expressed through ballot referenda (as in Massachusetts, Illinois, and Colorado),[59] is now shut off.

The sobering disadvantage of constitutional adjudication of this magnitude is the universality and permanence of the judgment. The enduring merit of legislative action is its responsiveness to the democratic process, and to revision and change: mistaken judgments may be corrected and refinements perfected. In England [60] and Canada [61] critical choices were made after studies canvassing all competing views, and in those countries revisions may be made in light of experience.[62]

As recently as 1967 a presidential commission did consider, as part of an overall study of crime in this country, whether the death penalty should be abolished.

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[59] See text accompanying nn. 27 & 28, *supra*.

[60] See n. 24, *supra*.

[61] See n. 23, *supra*.

[62] Recent legislative activity in New York State serves to underline the preferability of legislative action over constitutional adjudication. New York abolished the death penalty for murder in 1965, leaving only a few crimes for which the penalty is still available. See text accompanying n. 25, *supra*. On April 27, 1972, a bill that would have restored the death penalty was considered by the State Assembly. After several hours of heated debate, the bill was narrowly defeated by a vote of 65 to 59. N. Y. Times, Apr. 28, 1972, p. 1, col. 1. After seven years of disuse of the death penalty the representatives of the people in that State had not come finally to rest on the question of capital punishment. Because the 1965 decision had been the product of the popular will it could have been undone by an exercise of the same democratic process. No such flexibility is permitted when abolition, even though not absolute, flows from constitutional adjudication.

The commission's unanimous recommendation was as follows:

> "The question whether capital punishment is an appropriate sanction is a policy decision to be made by each State. Where it is retained, the types of offenses for which it is available should be strictly limited, and the law should be enforced in an even-handed and nondiscriminatory manner, with procedures for review of death sentences that are fair and expeditious. When a State finds that it cannot administer the penalty in such a manner, or that the death penalty is being imposed but not carried into effect, the penalty should be abandoned." [63]

The thrust of the Commission's recommendation, as presently relevant, is that this question "is a policy decision to be made by each State." There is no hint that this decision could or should be made by the judicial branch.

The National Commission on Reform of Federal Criminal Laws also considered the capital punishment issue. The introductory commentary of its final report states that "a sharp division [existed] within the Commission on the subject of capital punishment," although a

[63] President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 143 (1967) (chaired by Nicholas Katzenbach, then Attorney General of the United States). The text of the Report stated, among other things, that the abolition of the death penalty "is being widely debated in the States"; that it is "impossible to say with certainty whether capital punishment significantly reduces the incidence of heinous crimes"; that "[w]hatever views one may have on the efficacy of the death penalty as a deterrent, it clearly has an undesirable impact on the administration of criminal justice"; and that "[a]ll members of the Commission agree that the present situation in the administration of the death penalty in many States is intolerable." *Ibid.* As a member of this Presidential Commission I subscribed then, and do now, to the recommendations and views above quoted.

majority favored its abolition.[64] Again, consideration of the question was directed to the propriety of retention or abolition as a legislative matter. There was no suggestion that the difference of opinion existing among commission members, and generally across the country, could or should be resolved in one stroke by a decision of this Court.[65] Similar activity was, before today, evident at the state level with re-evaluation having been undertaken by special legislative committees in some States and by public ballot in others.[66]

With deference and respect for the views of the Justices who differ, it seems to me that all these studies—both in this country and elsewhere—suggest that, as a matter of policy and precedent, this is a classic case for the exercise of our oft-announced allegiance to judicial restraint. I know of no case in which greater gravity and delicacy have attached to the duty that this Court is called on to perform whenever legislation—state or federal—is challenged on constitutional grounds.[67] It seems to me that the sweeping judicial action undertaken today reflects a

[64] Final Report of the National Commission on Reform of Federal Criminal Laws 310 (1971).

[65] The American Law Institute, after years of study, decided not to take an official position on the question of capital punishment, although the Advisory Committee favored abolition by a vote of 18–2. The Council was more evenly divided but all were in agreement that many States would undoubtedly retain the punishment and that, therefore, the Institute's efforts should be directed toward providing standards for its implementation. ALI, Model Penal Code 65 (Tent. draft No. 9, 1959).

[66] See text accompanying nn. 26 through 30, *supra*.

[67] *Blodgett* v. *Holden*, 275 U. S. 142, 148 (1927) (separate opinion of Holmes, J.). See also *Trop* v. *Dulles*, 356 U. S., at 128 (Frankfurter, J., dissenting):

"The awesome power of this Court to invalidate . . . legislation, because in practice it is bounded only by our own prudence in discerning the limits of the Court's constitutional function, must be exercised with the utmost restraint."

basic lack of faith and confidence in the democratic process. Many may regret, as I do, the failure of some legislative bodies to address the capital punishment issue with greater frankness or effectiveness. Many might decry their failure either to abolish the penalty entirely or selectively, or to establish standards for its enforcement. But impatience with the slowness, and even the unresponsiveness, of legislatures is no justification for judicial intrusion upon their historic powers. Rarely has there been a more appropriate opportunity for this Court to heed the philosophy of Mr. Justice Oliver Wendell Holmes. As Mr. Justice Frankfurter reminded the Court in *Trop:*

> "[T]he whole of [Mr. Justice Holmes'] work during his thirty years of service on this Court should be a constant reminder that the power to invalidate legislation must not be exercised as if, either in constitutional theory or in the art of government, it stood as the sole bulwark against unwisdom or excesses of the moment." 356 U. S., at 128.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL join, dissenting.

The Court's judgments today strike down a penalty that our Nation's legislators have thought necessary since our country was founded. My Brothers DOUGLAS, BRENNAN, and MARSHALL would at one fell swoop invalidate laws enacted by Congress and 40 of the 50 state legislatures, and would consign to the limbo of unconstitutionality under a single rubric penalties for offenses as varied and unique as murder, piracy, mutiny, highjacking, and desertion in the face of the enemy. My Brothers STEWART and WHITE, asserting reliance on a more limited rationale—the reluctance of judges and juries actually to impose the death penalty in the majority of capital

cases—join in the judgments in these cases. Whatever its precise rationale, today's holding necessarily brings into sharp relief the fundamental question of the role of judicial review in a democratic society. How can government by the elected representatives of the people co-exist with the power of the federal judiciary, whose members are constitutionally insulated from responsiveness to the popular will, to declare invalid laws duly enacted by the popular branches of government?

The answer, of course, is found in Hamilton's Federalist Paper No. 78 and in Chief Justice Marshall's classic opinion in *Marbury* v. *Madison*, 1 Cranch 137 (1803). An oft-told story since then, it bears summarization once more. Sovereignty resides ultimately in the people as a whole and, by adopting through their States a written Constitution for the Nation and subsequently adding amendments to that instrument, they have both granted certain powers to the National Government, and denied other powers to the National and the State Governments. Courts are exercising no more than the judicial function conferred upon them by Art. III of the Constitution when they assess, in a case before them, whether or not a particular legislative enactment is within the authority granted by the Constitution to the enacting body, and whether it runs afoul of some limitation placed by the Constitution on the authority of that body. For the theory is that the people themselves have spoken in the Constitution, and therefore its commands are superior to the commands of the legislature, which is merely an agent of the people.

The Founding Fathers thus wisely sought to have the best of both worlds, the undeniable benefits of both democratic self-government and individual rights protected against possible excesses of that form of government.

The courts in cases properly before them have been entrusted under the Constitution with the last word, short of constitutional amendment, as to whether a law passed

by the legislature conforms to the Constitution. But just because courts in general, and this Court in particular, do have the last word, the admonition of Mr. Justice Stone dissenting in *United States* v. *Butler* must be constantly borne in mind:

> "[W]hile unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint." 297 U. S. 1, 78–79 (1936).

Rigorous attention to the limits of this Court's authority is likewise enjoined because of the natural desire that beguiles judges along with other human beings into imposing their own views of goodness, truth, and justice upon others. Judges differ only in that they have the power, if not the authority, to enforce their desires. This is doubtless why nearly two centuries of judicial precedent from this Court counsel the sparing use of that power. The most expansive reading of the leading constitutional cases does not remotely suggest that this Court has been granted a roving commission, either by the Founding Fathers or by the framers of the Fourteenth Amendment, to strike down laws that are based upon notions of policy or morality suddenly found unacceptable by a majority of this Court. The Framers of the Constitution would doubtless have agreed with the great English political philosopher John Stuart Mill when he observed:

> "The disposition of mankind, whether as rulers or as fellow-citizens, to impose their own opinions and inclinations as a rule of conduct on others, is so energetically supported by some of the best and by some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power." On Liberty 28 (1885).

A separate reason for deference to the legislative judgment is the consequence of human error on the part of the judiciary with respect to the constitutional issue before it. Human error there is bound to be, judges being men and women, and men and women being what they are. But an error in mistakenly sustaining the constitutionality of a particular enactment, while wrongfully depriving the individual of a right secured to him by the Constitution, nonetheless does so by simply letting stand a duly enacted law of a democratically chosen legislative body. The error resulting from a mistaken upholding of an individual's constitutional claim against the validity of a legislative enactment is a good deal more serious. For the result in such a case is not to leave standing a law duly enacted by a representative assembly, but to impose upon the Nation the judicial fiat of a majority of a court of judges whose connection with the popular will is remote at best.

The task of judging constitutional cases imposed by Art. III cannot for this reason be avoided, but it must surely be approached with the deepest humility and genuine deference to legislative judgment. Today's decision to invalidate capital punishment is, I respectfully submit, significantly lacking in those attributes. For the reasons well stated in the opinions of THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL, I conclude that this decision holding unconstitutional capital punishment is not an act of judgment, but rather an act of will. It completely ignores the strictures of Mr. Justice Holmes, writing more than 40 years ago in *Baldwin* v. *Missouri:*

> "I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly

> any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions. Yet I can think of no narrower reason that seems to me to justify the present and the earlier decisions to which I have referred. Of course the words 'due process of law,' if taken in their literal meaning, have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass." 281 U. S. 586, 595 (1930) (dissenting opinion).

More than 20 years ago, Justice Jackson made a similar observation with respect to this Court's restriction of the States in the enforcement of their own criminal laws:

> "The use of the due process clause to disable the States in protection of society from crime is quite as dangerous and delicate a use of federal judicial power as to use it to disable them from social or economic experimentation." *Ashcraft* v. *Tennessee*, 322 U. S. 143, 174 (1944) (dissenting opinion).

If there can be said to be one dominant theme in the Constitution, perhaps more fully articulated in the Federalist Papers than in the instrument itself, it is the notion of checks and balances. The Framers were well aware of the natural desire of office holders as well as others to seek to expand the scope and authority of their

particular office at the expense of others. They sought to provide against success in such efforts by erecting adequate checks and balances in the form of grants of authority to each branch of the government in order to counteract and prevent usurpation on the part of the others.

This philosophy of the Framers is best described by one of the ablest and greatest of their number, James Madison, in Federalist No. 51:

> "In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself."

Madison's observation applies to the Judicial Branch with at least as much force as to the Legislative and Executive Branches. While overreaching by the Legislative and Executive Branches may result in the sacrifice of individual protections that the Constitution was designed to secure against action of the State, judicial overreaching may result in sacrifice of the equally important right of the people to govern themselves. The Due Process and Equal Protection Clauses of the Fourteenth Amendment were "never intended to destroy the States' power to govern themselves." Black, J., in *Oregon* v. *Mitchell*, 400 U. S. 112, 126 (1970).

The very nature of judicial review, as pointed out by Justice Stone in his dissent in the *Butler* case, makes the courts the least subject to Madisonian check in the event that they shall, for the best of motives, expand judicial authority beyond the limits contemplated by the Framers. It is for this reason that judicial self-restraint is surely an implied, if not an expressed, condition of the grant of authority of judicial review. The Court's holding in these cases has been reached, I believe, in complete disregard of that implied condition.

Syllabus

MORRISSEY ET AL. *v.* BREWER, WARDEN, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 71–5103. Argued April 11, 1972—Decided June 29, 1972

Petitioners in these habeas corpus proceedings claimed that their paroles were revoked without a hearing and that they were thereby deprived of due process. The Court of Appeals, in affirming the District Court's denial of relief, reasoned that under controlling authorities parole is only "a correctional device authorizing service of sentence outside a penitentiary," and concluded that a parolee, who is still "in custody," is not entitled to a full adversary hearing such as would be mandated in a criminal proceeding. *Held:*

1. Though parole revocation does not call for the full panoply of rights due a defendant in a criminal proceeding, a parolee's liberty involves significant values within the protection of the Due Process Clause of the Fourteenth Amendment, and termination of that liberty requires an informal hearing to give assurance that the finding of a parole violation is based on verified facts to support the revocation. Pp. 480–482.

2. Due process requires a reasonably prompt informal inquiry conducted by an impartial hearing officer near the place of the alleged parole violation or arrest to determine if there is reasonable ground to believe that the arrested parolee has violated a parole condition. The parolee should receive prior notice of the inquiry, its purpose, and the alleged violations. The parolee may present relevant information and (absent security considerations) question adverse informants. The hearing officer shall digest the evidence on probable cause and state the reasons for holding the parolee for the parole board's decision. Pp. 484–487.

3. At the revocation hearing, which must be conducted reasonably soon after the parolee's arrest, minimum due process requirements are: (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement

by the factfinders as to the evidence relied on and reasons for revoking parole. Pp. 487–490.

443 F. 2d 942, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in the result, in which MARSHALL, J., joined, *post*, p. 490. DOUGLAS, J., filed an opinion dissenting in part, *post*, p. 491.

W. Don Brittin, Jr., by appointment of the Court, 404 U. S. 1036, argued the cause and filed briefs for petitioners.

Lawrence S. Seuferer, Assistant Attorney General of Iowa, argued the cause for respondents. With him on the brief was *Richard C. Turner*, Attorney General.

Briefs of *amici curiae* urging reversal were filed by *William W. Falsgraf* and *Robert J. Kutak* for the American Bar Association; by *Melvin L. Wulf*, *Herman Schwartz*, and *Robert Plotkin* for the American Civil Liberties Union; and by *Craig Eldon Pinkus* for James H. Russell.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to determine whether the Due Process Clause of the Fourteenth Amendment requires that a State afford an individual some opportunity to be heard prior to revoking his parole.

Petitioner Morrissey was convicted of false drawing or uttering of checks in 1967 pursuant to his guilty plea, and was sentenced to not more than seven years' confinement. He was paroled from the Iowa State Penitentiary in June 1968. Seven months later, at the direction of his parole officer, he was arrested in his home town as a parole violator and incarcerated in the county jail. One week later, after review of the parole officer's written report, the Iowa Board of Parole revoked Mor-

rissey's parole, and he was returned to the penitentiary located about 100 miles from his home. Petitioner asserts he received no hearing prior to revocation of his parole.

The parole officer's report on which the Board of Parole acted shows that petitioner's parole was revoked on the basis of information that he had violated the conditions of parole by buying a car under an assumed name and operating it without permission, giving false statements to police concerning his address and insurance company after a minor accident, obtaining credit under an assumed name, and failing to report his place of residence to his parole officer. The report states that the officer interviewed Morrissey, and that he could not explain why he did not contact his parole officer despite his effort to excuse this on the ground that he had been sick. Further, the report asserts that Morrissey admitted buying the car and obtaining credit under an assumed name, and also admitted being involved in the accident. The parole officer recommended that his parole be revoked because of "his continual violating of his parole rules."

The situation as to petitioner Booher is much the same. Pursuant to his guilty plea, Booher was convicted of forgery in 1966 and sentenced to a maximum term of 10 years. He was paroled November 14, 1968. In August 1969, at his parole officer's direction, he was arrested in his home town for a violation of his parole and confined in the county jail several miles away. On September 13, 1969, on the basis of a written report by his parole officer, the Iowa Board of Parole revoked Booher's parole and Booher was recommitted to the state penitentiary, located about 250 miles from his home, to complete service of his sentence. Petitioner asserts he received no hearing prior to revocation of his parole.

The parole officer's report with respect to Booher recommended that his parole be revoked because he had violated the territorial restrictions of his parole without consent, had obtained a driver's license under an assumed name, operated a motor vehicle without permission, and had violated the employment condition of his parole by failing to keep himself in gainful employment. The report stated that the officer had interviewed Booher and that he had acknowledged to the parole officer that he had left the specified territorial limits and had operated the car and had obtained a license under an assumed name "knowing that it was wrong." The report further noted that Booher had stated that he had not found employment because he could not find work that would pay him what he wanted—he stated he would not work for $2.25 to $2.75 per hour—and that he had left the area to get work in another city.

After exhausting state remedies, both petitioners filed habeas corpus petitions in the United States District Court for the Southern District of Iowa alleging that they had been denied due process because their paroles had been revoked without a hearing. The State responded by arguing that no hearing was required. The District Court held on the basis of controlling authority that the State's failure to accord a hearing prior to parole revocation did not violate due process. On appeal, the two cases were consolidated.

The Court of Appeals, dividing 4 to 3, held that due process does not require a hearing. The majority recognized that the traditional view of parole as a privilege rather than a vested right is no longer dispositive as to whether due process is applicable; however, on a balancing of the competing interests involved, it concluded that no hearing is required. The court reasoned that parole is only "a correctional device authorizing service of sentence outside the penitentiary," 443 F. 2d

942, 947; the parolee is still "in custody." Accordingly, the Court of Appeals was of the view that prison officials must have large discretion in making revocation determinations, and that courts should retain their traditional reluctance to interfere with disciplinary matters properly under the control of state prison authorities. The majority expressed the view that "non-legal, non-adversary considerations" were often the determinative factors in making a parole revocation decision. It expressed concern that if adversary hearings were required for parole revocation, "with the full panoply of rights accorded in criminal proceedings," the function of the parole board as "an administrative body acting in the role of *parens patriae* would be aborted," *id.*, at 949, and the board would be more reluctant to grant parole in the first instance—an apprehension that would not be without some basis if the choice were between a full-scale adversary proceeding or no hearing at all. Additionally, the majority reasoned that the parolee has no statutory right to remain on parole. Iowa law provides that a parolee may be returned to the institution at any time. Our holding in *Mempa* v. *Rhay*, 389 U. S. 128 (1967), was distinguished on the ground that it involved deferred sentencing upon probation revocation, and thus involved a stage of the criminal proceeding, whereas parole revocation was not a stage in the criminal proceeding. The Court of Appeals' decision was consistent with many other decisions on parole revocations.

In their brief in this Court, respondents assert for the first time that petitioners were in fact granted hearings after they were returned to the penitentiary. More generally, respondents say that within two months after the Board revokes an individual's parole and orders him returned to the penitentiary, on the basis of the parole officer's written report it grants the individual a hearing before the Board. At that time, the Board goes over "each of

the alleged parole violations with the returnee, and he is given an opportunity to orally present his side of the story to the Board." If the returnee denies the report, it is the practice of the Board to conduct a further investigation before making a final determination either affirming the initial revocation, modifying it, or reversing it.[1] Respondents assert that Morrissey, whose parole was revoked on January 31, 1969, was granted a hearing before the Board on February 12, 1969. Booher's parole was revoked on September 13, 1969, and he was granted a hearing on October 14, 1969. At these hearings, respondents tell us—in the briefs—both Morrissey and Booher admitted the violations alleged in the parole violation reports.

Nothing in the record supplied to this Court indicates that respondent claimed, either in the District Court or the Court of Appeals, that petitioners had received hearings promptly after their paroles were revoked, or that in such hearing they admitted the violations; that information comes to us only in the respondents' brief here. Further, even the assertions that respondents make here are not based on any public record but on interviews with two of the members of the parole board. In the interview relied on to show that petitioners admitted their violations, the board member did not assert he could remember that both Morrissey and Booher admitted the parole violations with which they were charged. He stated only that, according to his memory, in the previous several years all but three returnees had admitted commission of the parole infractions al-

[1] The hearing required by due process, as defined herein, must be accorded *before* the effective decision. See *Armstrong* v. *Manzo*, 380 U. S. 545 (1965). Petitioners assert here that only one of the 540 revocations ordered most recently by the Iowa Parole Board was reversed after hearing, Petitioners' Reply Brief 7, suggesting that the hearing may not objectively evaluate the revocation decision.

leged and that neither of the petitioners was among the three who denied them.

We must therefore treat this case in the posture and on the record respondents elected to rely on in the District Court and the Court of Appeals. If the facts are otherwise, respondents may make a showing in the District Court that petitioners in fact have admitted the violations charged before a neutral officer.

I

Before reaching the issue of whether due process applies to the parole system, it is important to recall the function of parole in the correctional process.

During the past 60 years, the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system. Note, Parole Revocation in the Federal System, 56 Geo. L. J. 705 (1968). Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison.[2] The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence. Under some systems, parole is granted automatically after the service of a certain portion of a prison term. Under others, parole is granted by the discretionary action of a board, which evaluates an array of information about a pris-

[2] See Warren, Probation in the Federal System of Criminal Justice, 19 Fed. Prob. 3 (Sept. 1955); Annual Report, Ohio Adult Parole Authority 1964/65, pp. 13–14; Note, Parole: A Critique of Its Legal Foundations and Conditions, 38 N. Y. U. L. Rev. 702, 705–707 (1963).

oner and makes a prediction whether he is ready to reintegrate into society.

To accomplish the purpose of parole, those who are allowed to leave prison early are subjected to specified conditions for the duration of their terms. These conditions restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen. Typically, parolees are forbidden to use liquor or to have associations or correspondence with certain categories of undesirable persons. Typically, also they must seek permission from their parole officers before engaging in specified activities, such as changing employment or living quarters, marrying, acquiring or operating a motor vehicle, traveling outside the community, and incurring substantial indebtedness. Additionally, parolees must regularly report to the parole officer to whom they are assigned and sometimes they must make periodic written reports of their activities. Arluke, A Summary of Parole Rules—Thirteen Years Later, 15 Crime & Delin. 267, 272–273 (1969).

The parole officers are part of the administrative system designed to assist parolees and to offer them guidance. The conditions of parole serve a dual purpose; they prohibit, either absolutely or conditionally, behavior that is deemed dangerous to the restoration of the individual into normal society. And through the requirement of reporting to the parole officer and seeking guidance and permission before doing many things, the officer is provided with information about the parolee and an opportunity to advise him. The combination puts the parole officer into the position in which he can try to guide the parolee into constructive development.[3]

The enforcement leverage that supports the parole conditions derives from the authority to return the pa-

[3] Note, Observations on the Administration of Parole, 79 Yale L. J. 698, 699–700 (1970).

rolee to prison to serve out the balance of his sentence if he fails to abide by the rules. In practice, not every violation of parole conditions automatically leads to revocation. Typically, a parolee will be counseled to abide by the conditions of parole, and the parole officer ordinarily does not take steps to have parole revoked unless he thinks that the violations are serious and continuing so as to indicate that the parolee is not adjusting properly and cannot be counted on to avoid antisocial activity.[4] The broad discretion accorded the parole officer is also inherent in some of the quite vague conditions, such as the typical requirement that the parolee avoid "undesirable" associations or correspondence. Cf. *Arciniega* v. *Freeman*, 404 U. S. 4 (1971). Yet revocation of parole is not an unusual phenomenon, affecting only a few parolees. It has been estimated that 35%–45% of all parolees are subjected to revocation and return to prison.[5] Sometimes revocation occurs when the parolee is accused of another crime; it is often preferred to a new prosecution because of the procedural ease of recommitting the individual on the basis of a lesser showing by the State.[6]

Implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole. The first step in a revocation decision thus involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that

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[4] *Ibid.*

[5] President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 62 (1967). The substantial revocation rate indicates that parole administrators often deliberately err on the side of granting parole in borderline cases.

[6] See *Morrissey* v. *Brewer*, 443 F. 2d 942, at 953–954, n. 5 (CA8 1971) (Lay, J., dissenting); *Rose* v. *Haskins*, 388 F. 2d 91, 104 (CA6 1968) (Celebrezze, J., dissenting).

the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation? The first step is relatively simple; the second is more complex. The second question involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing antisocial acts. This part of the decision, too, depends on facts, and therefore it is important for the board to know not only that some violation was committed but also to know accurately how many and how serious the violations were. Yet this second step, deciding what to do about the violation once it is identified, is not purely factual but also predictive and discretionary.

If a parolee is returned to prison, he usually receives no credit for the time "served" on parole.[7] Thus, the returnee may face a potential of substantial imprisonment.

II

We begin with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations. Cf. *Mempa* v. *Rhay*, 389 U. S. 128 (1967). Parole arises after the end of the criminal prosecution, including imposition of sentence. Supervision is not directly by the court but by an administrative agency, which is sometimes an arm of the court and sometimes of the executive. Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.

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[7] Arluke, A Summary of Parole Rules—Thirteen Years Later, 15 Crime and Delinquency 267, 271 (1969); Note, Parole Revocation in the Federal System, 56 Geo. L. J. 705, 733 (1968).

We turn, therefore, to the question whether the requirements of due process in general apply to parole revocations. As MR. JUSTICE BLACKMUN has written recently, "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Graham* v. *Richardson,* 403 U. S. 365, 374 (1971). Whether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss." *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring), quoted in *Goldberg* v. *Kelly,* 397 U. S. 254, 263 (1970). The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment. *Fuentes* v. *Shevin,* 407 U. S. 67 (1972). Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Union* v. *McElroy,* 367 U. S. 886, 895 (1961). To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

We turn to an examination of the nature of the interest

of the parolee in his continued liberty. The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison.[8] He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation.[9] The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. In many cases, the parolee faces lengthy incarceration if his parole is revoked.

We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a "right" or a "privilege." By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.

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[8] "It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom." *United States ex rel. Bey* v. *Connecticut Board of Parole*, 443 F. 2d 1079, 1086 (CA2 1971).

[9] See, *e. g.*, *Murray* v. *Page*, 429 F. 2d 1359 (CA10 1970) (parole revoked after eight years; 15 years remaining on original term).

Turning to the question what process is due, we find that the State's interests are several. The State has found the parolee guilty of a crime against the people. That finding justifies imposing extensive restrictions on the individual's liberty. Release of the parolee before the end of his prison sentence is made with the recognition that with many prisoners there is a risk that they will not be able to live in society without committing additional antisocial acts. Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole.

Yet, the State has no interest in revoking parole without some informal procedural guarantees. Although the parolee is often formally described as being "in custody," the argument cannot even be made here that summary treatment is necessary as it may be with respect to controlling a large group of potentially disruptive prisoners in actual custody. Nor are we persuaded by the argument that revocation is so totally a discretionary matter that some form of hearing would be administratively intolerable. A simple factual hearing will not interfere with the exercise of discretion. Serious studies have suggested that fair treatment on parole revocation will not result in fewer grants of parole.[10]

This discretionary aspect of the revocation decision need not be reached unless there is first an appropriate determination that the individual has in fact breached

[10] Sklar, Law and Practice in Probation and Parole Revocation Hearings, 55 J. Crim. L. C. & P. S. 175, 194 (1964) (no decrease in Michigan, which grants extensive rights); *Rose* v. *Haskins*, 388 F. 2d 91, 102 n. 16 (CA6 1968) (Celebrezze, J., dissenting) (cost of imprisonment so much greater than parole system that procedural requirements will not change economic motivation).

the conditions of parole. The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions. See *People ex rel. Menechino* v. *Warden*, 27 N. Y. 2d 376, 379, and n. 2, 267 N. E. 2d 238, 239, and n. 2 (1971) (parole board had less than full picture of facts). And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.[11]

Given these factors, most States have recognized that there is no interest on the part of the State in revoking parole without any procedural guarantees at all.[12] What is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior.

III

We now turn to the nature of the process that is due, bearing in mind that the interest of both State and

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[11] See President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 83, 88 (1967).

[12] See n. 15, *infra*. As one state court has written, "Before such a determination or finding can be made it appears that the principles of fundamental justice and fairness would afford the parolee a reasonable opportunity to explain away the accusation of a parole violation. [The parolee] . . . is entitled to a conditional liberty and possessed of a right which can be forfeited only by reason of a breach of the conditions of the grant." *Chase* v. *Page*, 456 P. 2d 590, 594 (Okla. Crim. App. 1969).

parolee will be furthered by an effective but informal hearing. In analyzing what is due, we see two important stages in the typical process of parole revocation.

(*a*) *Arrest of Parolee and Preliminary Hearing.* The first stage occurs when the parolee is arrested and detained, usually at the direction of his parole officer. The second occurs when parole is formally revoked. There is typically a substantial time lag between the arrest and the eventual determination by the parole board whether parole should be revoked. Additionally, it may be that the parolee is arrested at a place distant from the state institution, to which he may be returned before the final decision is made concerning revocation. Given these factors, due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. Cf. *Hyser* v. *Reed,* 115 U. S. App. D. C. 254, 318 F. 2d 225 (1963). Such an inquiry should be seen as in the nature of a "preliminary hearing" to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions. Cf. *Goldberg* v. *Kelly,* 397 U. S., at 267–271.

In our view, due process requires that after the arrest, the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case. It would be unfair to assume that the supervising parole officer does not conduct an interview with the parolee to confront him with the reasons for revocation before he recommends an arrest. It would also be unfair to assume that the parole officer bears hostility against the parolee that destroys his neutrality; realistically the failure of the parolee is in a sense a

failure for his supervising officer.[13] However, we need make no assumptions one way or the other to conclude that there should be an uninvolved person to make this preliminary evaluation of the basis for believing the conditions of parole have been violated. The officer directly involved in making recommendations cannot always have complete objectivity in evaluating them.[14] *Goldberg* v. *Kelly* found it unnecessary to impugn the motives of the caseworker to find a need for an independent decisionmaker to examine the initial decision.

This independent officer need not be a judicial officer. The granting and revocation of parole are matters traditionally handled by administrative officers. In *Goldberg*, the Court pointedly did not require that the hearing on termination of benefits be conducted by a judicial officer or even before the traditional "neutral and detached" officer; it required only that the hearing be conducted by some person *other* than one initially dealing with the case. It will be sufficient, therefore, in the parole revocation context, if an evaluation of whether reasonable cause exists to believe that conditions of parole have been violated is made by someone such as a parole officer other than the one who has made the report of parole violations or has recommended revocation. A State could certainly choose some other independent decisionmaker to perform this preliminary function.

With respect to the preliminary hearing before this officer, the parolee should be given notice that the hear-

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[13] Note, Observations on the Administration of Parole, 79 Yale L. J. 698, 704–706 (1970) (parole officers in Connecticut adopt role model of social worker rather than an adjunct of police, and exhibit a lack of punitive orientation).

[14] This is not an issue limited to bad motivation. "Parole agents are human, and it is possible that friction between the agent and parolee may have influenced the agent's judgment." 4 Attorney General's Survey on Release Procedures: Parole 246 (1939).

ing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation. The notice should state what parole violations have been alleged. At the hearing the parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer. On request of the parolee, a person who has given adverse information on which parole revocation is to be based is to be made available for questioning in his presence. However, if the hearing officer determines that an informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination.

The hearing officer shall have the duty of making a summary, or digest, of what occurs at the hearing in terms of the responses of the parolee and the substance of the documents or evidence given in support of parole revocation and of the parolee's position. Based on the information before him, the officer should determine whether there is probable cause to hold the parolee for the final decision of the parole board on revocation. Such a determination would be sufficient to warrant the parolee's continued detention and return to the state correctional institution pending the final decision. As in *Goldberg*, "the decision maker should state the reasons for his determination and indicate the evidence he relied on . . ." but it should be remembered that this is not a final determination calling for "formal findings of fact and conclusions of law." 397 U. S., at 271. No interest would be served by formalism in this process; informality will not lessen the utility of this inquiry in reducing the risk of error.

(*b*) *The Revocation Hearing.* There must also be an opportunity for a hearing, if it is desired by the parolee, prior to the final decision on revocation by the parole

authority. This hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation. The revocation hearing must be tendered within a reasonable time after the parolee is taken into custody. A lapse of two months, as respondents suggest occurs in some cases, would not appear to be unreasonable.

We cannot write a code of procedure; that is the responsibility of each State. Most States have done so by legislation, others by judicial decision usually on due process grounds.[15] Our task is limited to deciding the

[15] Very few States provide no hearing at all in parole revocations. Thirty States provide in their statutes that a parolee shall receive some type of hearing. See Ala. Code, Tit. 42, § 12 (1959); Alaska Stat. § 33.15.220 (1962); Ariz. Rev. Stat. Ann. § 31–417 (1956); Ark. Stat. Ann. § 43–2810 (Supp. 1971); Del. Code Ann., Tit. 11, § 4352 (Supp. 1970); Fla. Stat. Ann. § 947.23 (1) (Supp. 1972); Ga. Code Ann. § 77–519 (Supp. 1971); Haw. Rev. Stat. § 353–66 (1968); Idaho Code §§ 20–229, 20–229A (Supp. 1971); Ill. Ann. Stat., c. 108, §§ 204 (e), 207 (Supp. 1972); Ind. Ann. Stat. § 13–1611 (Supp. 1972); Kan. Stat. Ann. § 22–3721 (1971); Ky. Rev. Stat. Ann. § 439.330 (1)(e) (1962); La. Rev. Stat. Ann. § 15:574.9 (Supp. 1972); Me. Rev. Stat. Ann., Tit. 34, § 1675 (Supp. 1970–1971); Md. Ann. Code, Art. 41, § 117 (1971); Mich. Comp. Laws § 791.240a, Mich. Stat. Ann. § 28.2310 (1) (Supp. 1972); Miss. Code Ann. § 4004–13 (1956); Mo. Ann. Stat. § 549.265 (Supp. 1971); Mont. Rev. Codes Ann. §§ 94–9838, 94–9835 (1969); N. H. Rev. Stat. Ann. § 607:46 (1955); N. M. Stat. Ann. § 41–17–28 (1972); N. Y. Correc. Law § 212 subd. 7 (Supp. 1971); N. D. Cent. Code § 12–59–15 (Supp. 1971); Pa. Stat. Ann., Tit. 61, § 331.21a (b) (1964); Tenn. Code Ann. § 40–3619 (1955); Tex. Code Crim. Proc., Art. 42.12, § 22 (1966); Vt. Stat. Ann., Tit. 28, § 1081 (b) (1970); Wash. Rev. Code §§ 9.95.120 through 9.95.126 (Supp. 1971); W. Va. Code Ann. § 62–12–19 (1966). Decisions of state and federal courts have re-

minimum requirements of due process. They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.

We do not reach or decide the question whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent.[16]

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quired a number of other States to provide hearings. See *Hutchison* v. *Patterson*, 267 F. Supp. 433 (Colo. 1967) (approving parole board regulations); *United States ex rel. Bey* v. *Connecticut State Board of Parole*, 443 F. 2d 1079 (CA2 1971) (requiring counsel to be appointed for revocation hearings); *State* v. *Holmes*, 109 N. J. Super. 180, 262 A. 2d 725 (1970); *Chase* v. *Page*, 456 P. 2d 590 (Okla. Crim. App. 1969); *Bearden* v. *South Carolina*, 443 F. 2d 1090 (CA4 1971); *Baine* v. *Beckstead*, 10 Utah 2d 4, 347 P. 2d 554 (1959); *Goolsby* v. *Gagnon*, 322 F. Supp. 460 (ED Wis. 1971). A number of States are affected by no legal requirement to grant any kind of hearing.

[16] The Model Penal Code § 305.15 (1) (Proposed Official Draft 1962) provides that "[t]he institutional parole staff shall render reasonable aid to the parolee in preparation for the hearing and he shall be permitted to advise with his own legal counsel."

We have no thought to create an inflexible structure for parole revocation procedures. The few basic requirements set out above, which are applicable to future revocations of parole, should not impose a great burden on any State's parole system. Control over the required proceedings by the hearing officers can assure that delaying tactics and other abuses sometimes present in the traditional adversary trial situation do not occur. Obviously a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime.

In the peculiar posture of this case, given the absence of an adequate record, we conclude the ends of justice will be best served by remanding the case to the Court of Appeals for its return of the two consolidated cases to the District Court with directions to make findings on the procedures actually followed by the Parole Board in these two revocations. If it is determined that petitioners admitted parole violations to the Parole Board, as respondents contend, and if those violations are found to be reasonable grounds for revoking parole under state standards, that would end the matter. If the procedures followed by the Parole Board are found to meet the standards laid down in this opinion that, too, would dispose of the due process claims for these cases.

We reverse and remand to the Court of Appeals for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in the result.

I agree that a parole may not be revoked, consistently with the Due Process Clause, unless the parolee is afforded, first, a preliminary hearing at the time of arrest to determine whether there is probable cause to believe

that he has violated his parole conditions and, second, a final hearing within a reasonable time to determine whether he has, in fact, violated those conditions and whether his parole should be revoked. For each hearing the parolee is entitled to notice of the violations alleged and the evidence against him, opportunity to be heard in person and to present witnesses and documentary evidence, and the right to confront and cross-examine adverse witnesses, unless it is specifically found that a witness would thereby be exposed to a significant risk of harm. Moreover, in each case the decisionmaker must be impartial, there must be some record of the proceedings, and the decisionmaker's conclusions must be set forth in written form indicating both the evidence and the reasons relied upon. Because the Due Process Clause requires these procedures, I agree that the case must be remanded as the Court orders.

The Court, however, states that it does not now decide whether the parolee is also entitled at each hearing to the assistance of retained counsel or of appointed counsel if he is indigent. *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), nonetheless plainly dictates that he at least "must be allowed to retain an attorney if he so desires." *Id.*, at 270. As the Court said there, "Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of" his client. *Id.*, at 270–271. The only question open under our precedents is whether counsel must be furnished the parolee if he is indigent.

MR. JUSTICE DOUGLAS, dissenting in part.

Each petitioner was sentenced for a term in an Iowa penitentiary for forgery. Somewhat over a year later each was released on parole. About six months later, each was arrested for a parole violation and confined in a local jail. In about a week, the Iowa Board of Parole revoked their

paroles and each was returned to the penitentiary. At no time during any of the proceedings which led to the parole revocations were they granted a hearing or the opportunity to know, question, or challenge any of the facts which formed the basis of their alleged parole violations. Nor were they given an opportunity to present evidence on their own behalf or to confront and cross-examine those on whose testimony their paroles were revoked.

Each challenged the revocation in the state courts and, obtaining no relief, filed the present petitions in the Federal District Court, which denied relief. Their appeals were consolidated in the Court of Appeals which, sitting en banc, in each case affirmed the District Court by a four-to-three vote, 443 F. 2d 942. The cases are here on a petition for a writ of certiorari, 404 U. S. 999, which we granted because there is a conflict between the decision below and *Hahn* v. *Burke,* 430 F. 2d 100, decided by the Court of Appeals for the Seventh Circuit.

Iowa has a board of parole [1] which determines who shall be paroled. Once paroled, a person is under the supervision of the director of the division of corrections of the Department of Social Services, who, in turn, supervises parole agents. Parole agents do not revoke the parole of any person but only recommend that the board of parole revoke it. The Iowa Act provides that each parolee "shall be subject, at any time, to be taken into custody and returned to the institution" from which he

[1] Iowa Code § 247.5 (1971) provides in part:

"The board of parole shall determine which of the inmates of the state penal institutions qualify and thereafter shall be placed upon parole. Once an inmate is placed on parole he shall be under the supervision of the director of the division of corrections of the department of social services. There shall be a sufficient number of parole agents to insure proper supervision of all persons placed on parole. Parole agents shall not revoke the parole of any person but may recommend that the board of parole revoke such parole."

was paroled.[2] Thus, Iowa requires no notice or hearing to put a parolee back in prison, *Curtis* v. *Bennett,* 256 Iowa 1164, 131 N. W. 2d 1; and it is urged that since parole, like probation, is only a privilege it may be summarily revoked.[3] See *Escoe* v. *Zerbst,* 295 U. S. 490, 492–493; *Ughbanks* v. *Armstrong,* 208 U. S. 481. But we have long discarded the right-privilege distinction. See, *e. g., Graham* v. *Richardson,* 403 U. S. 365, 374; *Bell* v. *Burson,* 402 U. S. 535, 539; *Pickering* v. *Board of Education,* 391 U. S. 563, 568; cf. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

The Court said in *United States* v. *Wilson,* 7 Pet. 150, 161, that a "pardon is a deed." The same can be said of a parole, which when conferred gives the parolee a degree of liberty which is often associated with property interests.

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[2] *Id.,* § 247.9 provides in part:

"All paroled prisoners shall remain, while on parole, in the legal custody of the warden or superintendent and under the control of the chief parole officer, and shall be subject, at any time, to be taken into custody and returned to the institution from which they were paroled."

[3] "A fundamental problem with [the right-privilege] theory is that probation is now the most frequent penal disposition just as release on parole is the most frequent form of release from an institution. They bear little resemblance to episodic acts of mercy by a forgiving sovereign. A more accurate view of supervised release is that it is now an integral part of the criminal justice process and shows every sign of increasing popularity. Seen in this light, the question becomes whether legal safeguards should be provided for hundreds of thousands of individuals who daily are processed and regulated by governmental agencies. The system has come to depend on probation and parole as much as do those who are enmeshed in the system. Thus, in dealing with claims raised by offenders, we should make decisions based not on an outworn cliche but on the basis of present-day realities." F. Cohen, The Legal Challenge to Corrections: Implications for Manpower and Training 32 (Joint Commission on Correctional Manpower and Training 1969).

We held in *Goldberg* v. *Kelly*, 397 U. S. 254, that the termination by a State of public assistance payments to a recipient without a prior evidentiary hearing denies him procedural due process in violation of the Fourteenth Amendment. Speaking of the termination of welfare benefits we said:

> "Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are 'a "privilege" and not a "right." ' *Shapiro* v. *Thompson*, 394 U. S. 618, 627 n. 6 (1969). Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, *Sherbert* v. *Verner*, 374 U. S. 398 (1963); or to denial of a tax exemption, *Speiser* v. *Randall*, 357 U. S. 513 (1958); or to discharge from public employment, *Slochower* v. *Board of Higher Education*, 350 U. S. 551 (1956). The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U. S. 886, 895 (1961), 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' See also *Hannah* v. *Larche*, 363 U. S. 420, 440, 442 (1960)." 397 U. S., at 262–263.

Under modern concepts of penology, paroling prisoners is part of the rehabilitative aim of the correctional philosophy. The objective is to return a prisoner to a full family and community life. See generally Note, Parole Revocation in the Federal System, 56 Geo. L. J. 705 (1968); Note, Parole: A Critique of Its Legal Foundations and Conditions, 38 N. Y. U. L. Rev. 702 (1963); Comment, 72 Yale L. J. 368 (1962); and see *Baine* v. *Beckstead,* 10 Utah 2d 4, 347 P. 2d 554 (1959). The status he enjoys as a parolee is as important a right as those we reviewed in *Goldberg* v. *Kelly.* That status is conditioned upon not engaging in certain activities and perhaps in not leaving a certain area or locality. Violations of conditions of parole may be technical, they may be done unknowingly, they may be fleeting and of no consequence.[4] See, *e. g., Arciniega* v. *Freeman,* 404 U. S. 4; Cohen, Due Process, Equal Protection and State Parole Revocation Proceedings, 42 U. Colo. L. Rev. 197, 229 (1970). The parolee should, in the concept of fairness implicit in due process, have a chance to explain. Rather, under Iowa's rule revocation proceeds on the *ipse dixit* of the parole agent; and on his word alone each of these petitioners has already served three additional years in prison.[5] The charges may or may not be true. Words of explanation may be adequate to transform into trivia what looms large in the mind of the parole officer.

"[T]here is no place in our system of law for reach-

[4] The violations alleged in these cases on which revocation was based are listed by the Court of Appeals, 443 F. 2d 942, 943–944, nn. 1 and 2.

For a discussion of the British system that dispenses with precise conditions usually employed here see 120 U. Pa. L. Rev. 282, 311–312 (1971). As to conditions limiting constitutional rights see *id.,* at 313–324, 326–339.

[5] As to summary deprivations of individual liberty in Communist nations, see, *e. g.,* Shao-chuan Leng, Justice In Communist China 34 (1967); 1 P. Tang, Communist China Today 271 (2d ed. 1961); J. Hazard, Communists and Their Law 121–126 (1969).

ing a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons." *Kent* v. *United States,* 383 U. S. 541, 554 (1966).

Parole,[6] while originally conceived as a judicial function, has become largely an administrative matter. The parole boards have broad discretion in formulating and imposing parole conditions. "Often vague and moralistic, parole conditions may seem oppressive and unfair to the parolee." R. Dawson, Sentencing 306 (1969). They are drawn "to cover any contingency that might occur," *id.,* at 307, and are designed to maximize "control over the parolee by his parole officer." *Ibid.*

Parole is commonly revoked on mere suspicion that the parolee may have committed a crime. *Id.,* at 366–367. Such great control over the parolee vests in a parole officer a broad discretion in revoking parole and also in counseling the parolee—referring him for psychiatric treatment or obtaining the use of specialized therapy for narcotic addicts or alcoholics. *Id.,* at 321. Treatment of the parolee, rather than revocation of his parole, is a common course. *Id.,* at 322–323. Counseling may include extending help to a parolee in finding a job. *Id.,* at 324 *et seq.*

A parolee, like a prisoner, is a person entitled to constitutional protection, including procedural due process.[7] At the federal level, the construction of regulations of the Federal Parole Board presents federal questions of

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[6] "Parole is used after a sentence has been imposed while probation is usually granted in lieu of a prison term." R. Clegg, Probation and Parole 22 (1964). See *Baine* v. *Beckstead,* 10 Utah 2d 4, 9, 347 P. 2d 554, 558; *People ex rel. Combs* v. *LaVallee,* 29 App. Div. 2d 128, 131, 286 N. Y. S. 2d 600, 603.

[7] See President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 83, 84 (1967); 120 U. Pa. L. Rev. 282, 348–358 (1971).

which we have taken cognizance. See *Arciniega* v. *Freeman*, 404 U. S. 4. At the state level, the construction of parole statutes and regulations is for the States alone, save as they implicate the Federal Constitution in which event the Supremacy Clause controls.

It is only procedural due process, required by the Fourteenth Amendment, that concerns us in the present cases. Procedural due process requires the following.

If a violation of a condition of parole is involved, rather than the commission of a new offense, there should not be an arrest of the parolee and his return to the prison or to a local jail.[8] Rather, notice of the alleged violation should be given to the parolee and a time set for a hearing.[9] The

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[8] As Judge Skelly Wright said in *Hyser* v. *Reed*, 115 U. S. App. D. C. 254, 291, 318 F. 2d 225, 262 (1963) (concurring in part and dissenting in part):

"Where serious violations of parole have been committed, the parolee will have been arrested by local or federal authorities on charges stemming from those violations. Where the violation of parole is not serious, no reason appears why he should be incarcerated before hearing. If, of course, the parolee willfully fails to appear for his hearing, this in itself would justify issuance of the warrant." Accord, *In re Tucker*, 5 Cal. 3d 171, 199–200, 486 P. 2d 657, 676 (1971) (Tobriner, J., concurring and dissenting).

[9] As we said in another connection in *Greene* v. *McElroy*, 360 U. S. 474, 496–497:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted

hearing should not be before the parole officer, as he is the one who is making the charge and "there is inherent danger in combining the functions of judge and advocate." *Jones* v. *Rivers*, 338 F. 2d 862, 877 (CA4 1964) (Sobeloff, J., concurring). Moreover, the parolee should be entitled to counsel.[10] See *Hewett* v. *North Carolina*, 415 F. 2d 1316, 1322–1325 (CA4 1969); *People ex rel. Combs* v. *LaVallee*, 29 App. Div. 2d 128, 286 N. Y. S. 2d 600 (1968); *Perry* v. *Williard*, 247 Ore. 145, 427 P. 2d 1020 (1967). As the Supreme Court of Oregon said in *Perry* v. *Williard*, "A hearing in which counsel is absent or is present only on behalf of one side is inherently unsatisfactory if not unfair. Counsel can see that relevant facts are brought out, vague and insubstantial allegations discounted, and irrelevancies eliminated." *Id.*, at 148,

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with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, but also in all types of cases where administrative and regulatory actions were under scrutiny." (Citations omitted.)

[10] American Bar Association Project on Standards for Criminal Justice, Providing Defense Services 43 (Approved Draft 1968); Model Penal Code § 301.4, § 305.15 (1) (Proposed Official Draft 1962); R. Dawson, Sentencing (1969). For the experience of Michigan in giving hearings to parolees see *id.*, at 355. In Michigan, it is estimated that only one out of six parole violators retains counsel. One who cannot afford counsel is said to be protected by the hearing members of the board. *Id.*, at 354. The number who ask for public hearings are typically five or six a year, the largest in a single year being 10. Michigan has had this law since 1937. *Id.*, at 355. But the Michigan experience may not be typical, for a parole violator is picked up and returned at once to the institution from which he was paroled. *Id.*, at 352–353.

By way of contrast, parole revocation hearings in California are secretive affairs conducted behind closed doors and with no written record of the proceedings and in which the parolee is denied the assistance of counsel and the opportunity to present witnesses on his behalf. Van Dyke, Parole Revocation Hearings in California: The Right to Counsel, 59 Calif. L. Rev. 1215 (1971). See also Note, 56 Geo. L. J. 705 (1968) (federal parole revocation procedures).

427 P. 2d, at 1022. Cf. *Mempa* v. *Rhay*, 389 U. S. 128, 135.

The hearing required is not a grant of the full panoply of rights applicable to a criminal trial. But confrontation with the informer may, as *Roviaro* v. *United States*, 353 U. S. 53, illustrates, be necessary for a fair hearing and the ascertainment of the truth. The hearing is to determine the fact of parole violation. The results of the hearing would go to the parole board—or other authorized state agency—for final action, as would cases which involved voluntary admission of violations.

The rule of law is important in the stability of society. Arbitrary actions in the revocation of paroles can only impede and impair the rehabilitative aspects of modern penology. "Notice and opportunity for hearing appropriate to the nature of the case," *Boddie* v. *Connecticut*, 401 U. S. 371, 378, are the rudiments of due process which restore faith that our society is run for the many, not the few, and that fair dealing rather than caprice will govern the affairs of men.[11]

I would not prescribe the precise formula for the management of the parole problems. We do not sit as an ombudsman, telling the States the precise procedures they must follow. I would hold that so far as the due process requirements of parole revocation are concerned:[12]

(1) the parole officer—whatever may be his duties under various state statutes—in Iowa appears to be an agent having some of the functions of a prosecutor and

[11] The Brief of the American Civil Liberties Union, *amicus curiae*, contains in Appendix A the States that by statute or decision require some form of hearing before parole is revoked and those that do not. All but nine States now hold hearings on revocation of probation and parole, some with trial-type rights including representation by counsel.

[12] We except of course the commission of another offense which from the initial step to the end is governed by the normal rules of criminal procedure.

of the police: the parole officer is therefore not qualified as a hearing officer;

(2) the parolee is entitled to a due process notice and a due process hearing of the alleged parole violations including, for example, the opportunity to be confronted by his accusers and to present evidence and argument on his own behalf; and

(3) the parolee is entitled to the freedom granted a parolee until the results of the hearing are known and the parole board—or other authorized state agency—acts.[13]

I would reverse the judgments and remand for further consideration in light of this opinion.

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[13] The American Correctional Association states in its Manual of Correctional Standards 279 (3d ed. 1966) that:

"To an even greater extent than in the case of imprisonment, probation and parole practice is determined by an administrative discretion that is largely uncontrolled by legal standards, protections, or remedies. Until statutory and case law are more fully developed, it is vitally important within all of the correctional fields that there should be established and maintained reasonable norms and remedies against the sorts of abuses that are likely to develop where men have great power over their fellows and where relationships may become both mechanical and arbitrary."

And it provides for parole revocation hearings:

"As soon as practicable after causing an alleged violator [to be] taken into custody on the basis of a parole board warrant, the prisoner should be given an opportunity to appear before the board or its representative. The prisoner should be made fully aware of the reasons for the warrant, and given ample opportunity to refute the charges placed against him or to comment as to extenuating circumstances. The hearing should be the basis for consideration of possible reinstatement to parole supervision on the basis of the findings of fact or of reparole where it appears that further incarceration would serve no useful purpose." *Id.*, at 130.

The American Bar Association states at p. 10 of its brief *amicus* in the present cases that it is "in full agreement with the American Correctional Association in this instance. The position that a hearing is to be afforded on parole revocation is consistent with several sets of criminal justice standards formally approved by the Association through its House of Delegates."

Syllabus

UNITED STATES *v.* BREWSTER

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 70–45. Argued October 18, 1971—Reargued March 20, 1972—Decided June 29, 1972

Appellee, a former United States Senator, was charged with the solicitation and acceptance of bribes in violation of 18 U. S. C. §§ 201 (c) (1) and 201 (g). The District Court, on appellee's pretrial motion, dismissed the indictment on the ground that the Speech or Debate Clause of the Constitution shielded him "from any prosecution for alleged bribery to perform a legislative act." The United States filed a direct appeal to this Court under 18 U. S. C. § 3731 (1964 ed., Supp. V), which appellee contends this Court does not have jurisdiction to entertain because the District Court's action was not "a decision or judgment setting aside, or dismissing" the indictment but was instead a summary judgment on the merits based on the facts of the case. *Held:*

1. This Court has jurisdiction under 18 U. S. C. § 3731 (1964 ed., Supp. V) to hear the appeal, since the District Court's order was based upon its determination of the constitutional invalidity of 18 U. S. C. §§ 201 (c) (1) and 201 (g) on the facts as alleged in the indictment. Pp. 504–507.

2. The prosecution of appellee is not prohibited by the Speech or Debate Clause. Although that provision protects Members of Congress from inquiry into legislative acts or the motivation for performance of such acts, *United States* v. *Johnson*, 383 U. S. 169, 185, it does not protect all conduct *relating* to the legislative process. Since in this case prosecution of the bribery charges does not necessitate inquiry into legislative acts or motivation, the District Court erred in holding that the Speech or Debate Clause required dismissal of the indictment. Pp. 507–529.

Reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion in which DOUGLAS, J., joined, *post*, p. 529. WHITE, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined, *post*, p. 551.

Solicitor General Griswold reargued the cause for the United States. With him on the briefs on the original argument were *Assistant Attorney General Wilson, Jerome M. Feit,* and *Beatrice Rosenberg.* With him on the brief on the reargument were *Assistant Attorney General Petersen* and *Mr. Feit.*

Norman P. Ramsey reargued the cause for appellee. With him on the briefs were *Thomas Waxter, Jr.,* and *H. Thomas Howell.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This direct appeal from the District Court presents the question whether a Member of Congress may be prosecuted under 18 U. S. C. §§ 201 (c)(1), 201 (g), for accepting a bribe in exchange for a promise relating to an official act. Appellee, a former United States Senator, was charged in five counts of a 10-count indictment.[1] Counts one, three, five, and seven alleged that on four separate occasions, appellee, while he was a Senator and a member of the Senate Committee on Post Office and Civil Service,

> "directly and indirectly, corruptly asked, solicited, sought, accepted, received and agreed to receive [sums] . . . in return for being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity . . . in violation of Sections 201 (c)(1) and 2, Title 18, United States Code." [2]

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[1] The remaining five counts charged the alleged bribers with offering and giving bribes in violation of 18 U. S. C. § 201 (b).

[2] Title 18 U. S. C. § 201 (c) provides: "Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives,

Count nine charged that appellee

> "directly and indirectly, asked, demanded, exacted, solicited, sought, accepted, received and agreed to receive [a sum] . . . for and because of official acts performed by him in respect to his action, vote and decision on postage rate legislation which had been pending before him in his official capacity . . . in violation of Sections 201 (g) and 2, Title 18, United States Code." [3]

Before a trial date was set, the appellee moved to dismiss the indictment on the ground of immunity under the Speech or Debate Clause, Art. I, § 6, of the Constitution, which provides:

> "[F]or any Speech or Debate in either House, they [Senators or Representatives] shall not be questioned in any other Place."

After hearing argument, the District Court ruled from the bench:

> "Gentlemen, based on the facts of this case,

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or agrees to receive anything of value for himself or for any other person or entity, in return for:

"(1) being influenced in his performance of any official act . . . [shall be guilty of an offense]."

Title 18 U. S. C. § 201 (a) defines "public official" to include "Member of Congress." The same subsection provides: " 'official act' means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit." Title 18 U. S. C. § 2 is the aiding or abetting statute.

[3] Title 18 U. S. C. § 201 (g) provides: "Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him . . . [shall be guilty of an offense]."

it is admitted by the Government that the five counts of the indictment which charge Senator Brewster relate to the acceptance of bribes in connection with the performance of a legislative function by a Senator of the United States.

"It is the opinion of this Court that the immunity under the Speech and [*sic*] Debate Clause of the Constitution, particularly in view of the interpretation given that Clause by the Supreme Court in Johnson, shields Senator Brewster, constitutionally shields him from any prosecution for alleged bribery to perform a legislative act.

"I will, therefore, dismiss the odd counts of the indictment, 1, 3, 5, 7 and 9, as they apply to Senator Brewster."

The United States filed a direct appeal to this Court, pursuant to 18 U. S. C. § 3731 (1964 ed., Supp. V).[4] We postponed consideration of jurisdiction until hearing the case on the merits. 401 U. S. 935 (1971).

I

The United States asserts that this Court has jurisdiction under 18 U. S. C. § 3731 (1964 ed., Supp. V) to

[4] Title 18 U. S. C. § 3731 provided in relevant part:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

. . . . . .

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

The statute has since been amended to eliminate the direct appeal provision on which the United States relies. 18 U. S. C. § 3731. This appeal, however, was perfected under the old statute.

review the District Court's dismissal of the indictment against appellee. Specifically, the United States urges that the District Court decision was either "a decision or judgment setting aside, or dismissing [an] indictment . . . or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment . . . is founded" or a "decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy." If the District Court decision is correctly characterized by either of those descriptions, this Court has jurisdiction under the statute to hear the United States' appeal.

In *United States* v. *Knox,* 396 U. S. 77 (1969), we considered a direct appeal by the United States from the dismissal of an indictment that charged the appellee in that case with violating 18 U. S. C. § 1001, a general criminal provision punishing fraudulent statements made to any federal agency. The appellee, Knox, had been accused of willfully understating the number of employees accepting wagers on his behalf when he filed a form that persons engaged in the business of accepting wagers were required by law to file. The District Court dismissed the counts charging violations of § 1001 on the ground that the appellee could not be prosecuted for failure to answer the wagering form correctly since his Fifth Amendment privilege against self-incrimination prevented prosecution for failure to file the form in any respect. We found jurisdiction under § 3731 to hear the appeal in *Knox* on the theory that the District Court had passed on the validity of the statute on which the indictment rested. 396 U. S., at 79 n. 2. The District Court in that case held that "§ 1001, as applied to this class of cases, is constitutionally invalid." *Ibid.*

The counts of the indictment involved in the instant case were based on 18 U. S. C. § 201, a bribery statute.

Section 201 applies to "public officials," and that term is defined explicitly to include Members of Congress as well as other employees and officers of the United States. Subsections (c)(1) and (g) prohibit the accepting of a bribe in return for being influenced in or performing an official act. The ruling of the District Court here was that "the Speech [or] Debate Clause of the Constitution, particularly in view of the interpretation given . . . in Johnson, shields Senator Brewster . . . from any prosecution for alleged bribery to perform a legislative act." Since § 201 applies only to bribery for the performance of official acts, the District Court's ruling is that, as applied to Members of Congress, § 201 is constitutionally invalid.

Appellee argues that the action of the District Court was not "a decision or judgment setting aside, or dismissing" the indictment, but was instead a summary judgment on the merits. Appellee also argues that the District Court did not rule that § 201 could never be constitutionally applied to a Member of Congress, but that "based on the facts of this case" the statute could not be constitutionally applied. Under *United States* v. *Sisson,* 399 U. S. 267 (1970), an appeal does not lie from a decision that rests, not upon the sufficiency of the indictment alone, but upon extraneous facts. If an indictment is dismissed as a result of a stipulated fact or the showing of evidentiary facts outside the indictment, which facts would constitute a defense on the merits at trial, no appeal is available. See *United States* v. *Findley,* 439 F. 2d 970 (CA1 1971). Appellee claims that the District Court relied on factual matter other than facts alleged in the indictment.

An examination of the record, however, discloses that, with the exception of a letter in which the United States briefly outlined the theory of its case against appellee, there were no "facts" on which the District Court could

act other than those recited in the indictment. Appellee contends that the statement "based on the facts of this case," used by the District Judge in announcing his decision, shows reliance on the Government's outline of its case. We read the District Judge's reference to "facts," in context, as a reference to the facts alleged in the indictment, and his ruling as holding that Members of Congress are totally immune from prosecution for accepting bribes for the performance of official, *i. e.*, legislative, acts by virtue of the Speech or Debate Clause. Under that interpretation of § 201, it cannot be applied to a Member of Congress who accepts bribes that relate in any way to his office. We conclude, therefore, that the District Court was relying only on facts alleged in the indictment and that the dismissal of the indictment was based on a determination that the statute on which the indictment was drawn was invalid under the Speech or Debate Clause. As a consequence, this Court has jurisdiction to hear the appeal.

II

The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators. The genesis of the Clause at common law is well known. In his opinion for the Court in *United States* v. *Johnson*, 383 U. S. 169 (1966), Mr. Justice Harlan canvassed the history of the Clause and concluded that it

> "was the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legisla-

tors. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature." *Id.*, at 178 (footnote omitted).

Although the Speech or Debate Clause's historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system. We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a co-ordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy.[5] Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government.

It does not undermine the validity of the Framers' concern for the independence of the Legislative Branch to acknowledge that our history does not reflect a catalogue of abuses at the hands of the Executive that gave rise to the privilege in England. There is nothing in our history, for example, comparable to the imprisonment of a Member of Parliament in the Tower without a hearing and, owing to the subservience of some royal judges to the 17th and 18th century English kings, without meaningful recourse to a writ of habeas corpus.[6] In fact, on only one previous occasion has this Court ever

[5] Cella, The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts, 2 Suffolk L. Rev. 1, 15 (1968); Note, The Bribed Congressman's Immunity from Prosecution, 75 Yale L. J. 335, 337–338 (1965).

[6] See C. Wittke, The History of English Parliamentary Privilege 23–32 (1921).

interpreted the Speech or Debate Clause in the context of a criminal charge against a Member of Congress.

(a) In *United States* v. *Johnson, supra,* the Court reviewed the conviction of a former Representative on seven counts of violating the federal conflict-of-interest statute, 18 U. S. C. § 281 (1964 ed.), and on one count of conspiracy to defraud the United States, 18 U. S. C. § 371. The Court of Appeals had set aside the conviction on the count for conspiracy to defraud as violating the Speech or Debate Clause. Mr. Justice Harlan, speaking for the Court, 383 U. S., at 183, cited the oft-quoted passage of Mr. Justice Lush in *Ex parte Wason,* L. R. 4 Q. B. 573 (1869):

> "I am clearly of opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal proceedings *with respect to anything they may do or say in the House.*" *Id.,* at 577 (emphasis added).

In *Kilbourn* v. *Thompson,* 103 U. S. 168 (1881), the first case in which this Court interpreted the Speech or Debate Clause, the Court expressed a similar view of the ambit of the American privilege. There the Court said the Clause is to be read broadly to include anything "generally done in a session of the House by one of its members in relation to the business before it." *Id.,* at 204. This statement, too, was cited with approval in *Johnson,* 383 U. S., at 179. Our conclusion in *Johnson* was that the privilege protected Members from inquiry into legislative acts or the motivation for actual performance of legislative acts. *Id.,* at 185.

In applying the Speech or Debate Clause, the Court focused on the specific facts of the *Johnson* prosecution. The conspiracy-to-defraud count alleged an agreement among Representative Johnson and three co-

defendants to obtain the dismissal of pending indictments against officials of savings and loan institutions. For these services, which included a speech made by Johnson on the House floor, the Government claimed Johnson was paid a bribe. At trial, the Government questioned Johnson extensively, relative to the conspiracy-to-defraud count, concerning the authorship of the speech, the factual basis for certain statements made in the speech, and his motives for giving the speech. The Court held that the use of evidence of a speech to support a count under a broad conspiracy statute was prohibited by the Speech or Debate Clause. The Government was, therefore, precluded from prosecuting the conspiracy count on retrial, insofar as it depended on inquiries into speeches made in the House.

It is important to note the very narrow scope of the Court's holding in *Johnson:*

> "We hold that a prosecution under a general criminal statute dependent on such inquiries [into the speech or its preparation] necessarily contravenes the Speech or Debate Clause. We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us." 383 U. S., at 184–185.

The opinion specifically left open the question of a prosecution which, though possibly entailing some reference to legislative acts, is founded upon a "narrowly drawn" statute passed by Congress in the exercise of its power to regulate its Members' conduct. Of more relevance to this case, the Court in *Johnson* emphasized that its decision did not affect a prosecution that, though founded on a criminal statute of general application, "does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them." *Id.*, at 185. The Court did not

question the power of the United States to try Johnson on the conflict-of-interest counts, and it authorized a new trial on the conspiracy count, provided that all references to the making of the speech were eliminated.[7]

Three members of the Court would have affirmed Johnson's conviction. Mr. Chief Justice Warren, joined by MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN, concurring in part and dissenting in part, stated:

> "After reading the record, it is my conclusion that the Court of Appeals erred in determining that the evidence concerning the speech infected the jury's judgment on the [conflict-of-interest] counts. The evidence amply supports the prosecution's theory and the jury's verdict on these counts—that the respondent received over $20,000 for attempting to have the Justice Department dismiss an indictment against his [present] co-conspirators, without disclosing his role in the enterprise. This is the classic example of a violation of § 281 by a Member of the Congress. . . . The arguments of government counsel and the court's instructions separating the conspiracy from the substantive counts seem unimpeachable. The speech was a minor part of the prosecution. There was nothing in it to inflame the jury and the respondent pointed with pride to it as evidence of his vigilance in protecting the financial institutions of his State. The record further reveals that the trial participants were well aware that a finding of criminality on one count did not authorize sim-

[7] On remand, the District Court dismissed the conspiracy count without objection from the Government. Johnson was then found guilty on the remaining counts, and his conviction was affirmed. *United States* v. *Johnson*, 419 F. 2d 56 (CA4 1969), cert. denied, 397 U. S. 1010 (1970).

ilar conclusions as to other counts, and I believe that this salutary principle was conscientiously followed. Therefore, I would affirm the convictions on the substantive counts." *Id.*, at 188–189. (Footnote omitted.)

Johnson thus stands as a unanimous holding that a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts. A legislative act has consistently been defined as an act generally done in Congress in relation to the business before it. In sum, the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts.

It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called "news letters" to constituents, news releases, and speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause. Careful examination of the decided cases reveals that the Court has regarded the protection as reaching only those things "generally done in a

session of the House by one of its members in relation to the business before it," *Kilbourn* v. *Thompson, supra,* at 204, or things "said or done by him, as a representative, in the exercise of the functions of that office," *Coffin* v. *Coffin,* 4 Mass. 1, 27 (1808).

(b) Appellee argues, however, that in *Johnson* we expressed a broader test for the coverage of the Speech or Debate Clause. It is urged that we held that the Clause protected from executive or judicial inquiry all conduct "related to the due functioning of the legislative process." It is true that the quoted words appear in the *Johnson* opinion, but appellee takes them out of context; in context they reflect a quite different meaning from that now urged. Although the indictment against Johnson contained eight counts, only one count was challenged before this Court as in violation of the Speech or Debate Clause. The other seven counts concerned Johnson's attempts to influence staff members of the Justice Department to dismiss pending prosecutions. In explaining why those counts were not before the Court, Mr. Justice Harlan wrote:

> "No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise *related to the due functioning of the legislative process.* It is the application of this broad conspiracy statute to an improperly motivated speech that raises the constitutional problem with which we deal." 383 U. S., at 172. (Emphasis added; footnote omitted.)

In stating that those things "in no wise related to the due functioning of the legislative process" were *not* covered by the privilege, the Court did not in any sense imply as a corollary that everything that "related" to the

office of a Member was shielded by the Clause. Quite the contrary, in *Johnson* we held, citing *Kilbourn* v. *Thompson, supra,* that only acts generally done in the course of the process of enacting legislation were protected.

Nor can we give *Kilbourn* a more expansive interpretation. In citing with approval, 103 U. S., at 203, the language of Chief Justice Parsons of the Supreme Judicial Court of Massachusetts in *Coffin* v. *Coffin,* 4 Mass. 1 (1808), the *Kilbourn* Court gave no thought to enlarging "legislative acts" to include illicit conduct outside the House. The *Coffin* language is:

> "[The Massachusetts legislative privilege] ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office: and I would define the article, as securing to every member exemption from prosecution, *for every thing said or done by him, as a representative, in the exercise of the functions of that office* without enquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house; and I am satisfied that there are cases, in which he is entitled to this privilege, when not within the walls of the representatives' chamber." *Id.,* at 27 (emphasis added).

It is suggested that in citing these words, which were also quoted with approval in *Tenney* v. *Brandhove,* 341 U. S. 367, 373–374 (1951), the Court was interpreting the sweep of the Speech or Debate Clause to be broader than *Johnson* seemed to indicate or than we today hold. Emphasis is placed on the statement that "there are

cases in which [a Member] is entitled to this privilege, when not within the walls of the representatives' chamber." But the context of *Coffin* v. *Coffin* indicates that in this passage Chief Justice Parsons was referring only to legislative acts, such as committee meetings, which take place outside the physical confines of the legislative chamber. In another passage, the meaning is clarified:

> "If a member . . . be out of the chamber, sitting in committee, executing the commission of the house, it appears to me that such member is within the reason of the article, and ought to be considered within the privilege. The body of which he is a member, is in session, and he, as a member of that body, is in fact discharging the duties of his office. He ought therefore to be protected from civil or criminal prosecutions for every thing said or done by him in the exercise of his functions, as a representative in committee, either in debating, in assenting to, or in draughting a report." [8] 4 Mass., at 28.

In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process.[9] In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was

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[8] It is especially important to note that in *Coffin* v. *Coffin*, the court concluded that the defendant was not executing the duties of his office when he allegedly defamed the plaintiff and was hence not entitled to the claim of privilege.

[9] The "concession" MR. JUSTICE BRENNAN seeks to attribute to the Government lawyer who argued the case in the District Court reveals no more than the failure of the arguments in that court to focus on the distinction between true legislative acts and the myriad related political functions of a Member of Congress. The "concession" came in response to a question clearly revealing that the District Court treated as protected all acts "related" to the office rather than limiting the protection to what is "said or done by him, as a representative, in the exercise of the functions of that office."

clearly a part of the legislative process—the *due* functioning of the process.[10] Appellee's contention for a broader interpretation of the privilege draws essentially on the flavor of the rhetoric and the sweep of the language used by courts, not on the precise words used in any prior case, and surely not on the sense of those cases, fairly read.

(c) We would not think it sound or wise, simply out of an abundance of caution to doubly insure legislative independence, to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process. Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to "relate" to the legislative process. Admittedly, the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence of the Legislative Branch, but no more than the statutes we apply, was its purpose to make Members of Congress super-citizens, immune from criminal responsibility. In its narrowest scope, the Clause is a very large, albeit essential, grant of privilege. It has enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the Framers.[11]

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[10] See *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881) (voting for a resolution); *Tenney* v. *Brandhove*, 341 U. S. 367 (1951) (harassment of witness by state legislator during a legislative hearing; not a Speech or Debate Clause case); *United States* v. *Johnson*, 383 U. S. 169 (1966) (making a speech on House floor); *Dombrowski* v. *Eastland*, 387 U. S. 82 (1967) (subpoenaing records for committee hearing); *Powell* v. *McCormack*, 395 U. S. 486 (1969) (voting for a resolution).

In *Coffin* v. *Coffin*, 4 Mass. 1 (1808), the state equivalent of the Speech or Debate Clause was held to be inapplicable to a legislator who was acting outside of his official duties.

[11] "To this construction of the article it is objected, that a private citizen may have his character basely defamed, without any pecuniary

The history of the privilege is by no means free from grave abuses by legislators. In one instance, abuses reached such a level in England that Parliament was compelled to enact curative legislation.

> "The practice of granting the privilege of freedom from arrest and molestation to members' servants in time became a serious menace to individual liberty and to public order, and a form of protection by which offenders often tried—and they were often successful—to escape the penalties which their offences deserved and which the ordinary courts would not have hesitated to inflict. Indeed, the sale of 'protections' at one time proved a source of income to unscrupulous members, and these parliamentary 'indulgences' were on several occasions obtainable at a fixed market price." C. Wittke, The History of English Parliamentary Privilege 39 (1921).

The authors of our Constitution were well aware of the history of both the need for the privilege and the abuses that could flow from too sweeping safeguards. In order to preserve other values, they wrote the privilege so that it tolerates and protects behavior on the part of Members not tolerated and protected when done by other citizens, but the shield does not extend beyond what is necessary to preserve the integrity of the legislative process. Moreover, unlike England with no formal, written constitutional limitations on the monarch, we defined limits on the co-ordinate branches, pro-

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recompense or satisfaction. The truth of the objection is admitted. . . . The injury to the reputation of a private citizen is of less importance to the commonwealth, than the free and unreserved exercise of the duties of a representative, unawed by the fear of legal prosecutions." *Coffin* v. *Coffin*, 4 Mass., at 28.

See *Cochran* v. *Couzens*, 59 App. D. C. 374, 42 F. 2d 783, cert. denied, 282 U. S. 874 (1930) (defamatory words uttered on Senate floor could not be basis of slander action).

viding other checks to protect against abuses of the kind experienced in that country.

It is also suggested that, even if we interpreted the Clause broadly so as to exempt from inquiry all matters having any relationship to the legislative process, misconduct of Members would not necessarily go unpunished because each House is empowered to discipline its Members. Article I, § 5, does indeed empower each House to "determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member," but Congress is ill-equipped to investigate, try, and punish its Members for a wide range of behavior that is loosely and incidentally related to the legislative process. In this sense, the English analogy on which the dissents place much emphasis, and the reliance on *Ex parte Wason,* L. R. 4 Q. B. 573 (1869), are inapt. Parliament is itself "The High Court of Parliament"—the highest court in the land—and its judicial tradition better equips it for judicial tasks.

> "It is by no means an exaggeration to say that [the judicial characteristics of Parliament] colored and influenced some of the great struggles over [legislative] privilege in and out of Parliament to the very close of the nineteenth century. It is not altogether certain whether they have been entirely forgotten even now. Nowhere has the theory that Parliament is a court—the highest court of the realm, often acting in a judicial capacity and in a judicial manner—persisted longer than in the history of privilege of Parliament." Wittke, *supra,* at 14.

The very fact of the supremacy of Parliament as England's highest tribunal explains the long tradition precluding trial for official misconduct of a member in any other and lesser tribunal.

In Australia and Canada, "where provision for legisla-

tive free speech or debate exists but where the legislature may not claim a tradition as the highest court of the realm, courts have held that the privilege does not bar the criminal prosecution of legislators for bribery." Note, The Bribed Congressman's Immunity from Prosecution, 75 Yale L. J. 335, 338 (1965) (footnote omitted). Congress has shown little inclination to exert itself in this area.[12] Moreover, if Congress did lay aside its normal activities and take on itself the responsibility to police and prosecute the myriad activities of its Members related to but not directly a part of the legislative function, the independence of individual Members might actually be impaired.

The process of disciplining a Member in the Congress is not without countervailing risks of abuse since it is not surrounded with the panoply of protective shields that are present in a criminal case. An accused Member is judged by no specifically articulated standards[13] and is at the mercy of an almost unbridled discretion of the charging body that functions at once as accuser, prosecutor, judge, and jury from whose decision there is no established right of review. In short, a Member would be compelled to defend in what would be comparable to a criminal prosecution without the safeguards provided by the Constitution. Moreover, it would be somewhat naive to assume that the triers would be wholly objective and free from considerations

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[12] See Thomas, Freedom of Debate: Protector of the People or Haven for the Criminal?, 3 The Harvard Rev. 74, 80–81 (No. 3, 1965); Note, The Bribed Congressman's Immunity from Prosecution, 75 Yale L. J. 335, 349 n. 84 (1965); Oppenheim, Congressional Free Speech, 8 Loyola L. Rev. 1, 27–28 (1955–1956).

[13] See, *e. g.*, *In re Chapman*, 166 U. S. 661, 669–670 (1897):

"The right to expel extends to all cases where the offence is such as in the judgment of the Senate is inconsistent with the trust and duty of a member."

of party and politics and the passions of the moment.[14] Strong arguments can be made that trials conducted in a Congress with an entrenched majority from one political party could result in far greater harassment than a conventional criminal trial with the wide range of procedural protections for the accused, including indictment by grand jury, trial by jury under strict standards of proof with fixed rules of evidence, and extensive appellate review.

Finally, the jurisdiction of Congress to punish its Members is not all-embracing. For instance, it is unclear to what extent Congress would have jurisdiction over a case such as this in which the alleged illegal activity occurred outside the chamber, while the appellee was a Member, but was undiscovered or not brought before a grand jury until after he left office.[15]

The sweeping claims of appellee would render Members of Congress virtually immune from a wide range of crimes simply because the acts in question were peripherally related to their holding office. Such claims are inconsistent with the reading this Court has given, not only to the Speech or Debate Clause, but also to the other legislative privileges embodied in Art. I, § 6. The very sentence in which the Speech or Debate Clause appears provides that Members "shall in all Cases, ex-

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[14] See the account of the impeachment of President Andrew Johnson in J. Kennedy, Profiles in Courage 126–151 (1955). See also the account of the impeachment of Mr. Justice Samuel Chase in 3 A. Beveridge, The Life of John Marshall 169–220 (1919).

[15] ". . . English Parliaments have historically reserved to themselves and still retain the sole and exclusive right to punish their members for the acceptance of a bribe in the discharge of their office. No member of Parliament may be tried for such an offense in any court of the land." Cella, *supra*, n. 5, at 15–16. That this is obviously not the case in this country is implicit in the remand of Representative Johnson to be retried on bribery charges.

cept Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their Respective Houses. . . ." In *Williamson* v. *United States,* 207 U. S. 425 (1908), this Court rejected a claim, made by a Member convicted of subornation of perjury in proceedings for the purchase of public lands, that he could not be arrested, convicted, or imprisoned for any crime that was not treason, felony, or breach of the peace in the modern sense, *i. e.,* disturbing the peace. Mr. Justice Edward Douglass White noted that when the Constitution was written the term "breach of the peace" did not mean, as it came to mean later, a misdemeanor such as disorderly conduct but had a different 18th century usage, since it derived from breaching the King's peace and thus embraced the whole range of crimes at common law. Quoting Lord Mansfield, he noted, with respect to the claim of parliamentary privilege, "[t]he laws of this country allow no place or employment as a sanctuary for crime . . . ." *Id.,* at 439.

The subsequent case of *Long* v. *Ansell,* 293 U. S. 76 (1934), held that a Member's immunity from arrest in civil cases did not extend to civil process. Mr. Justice Brandeis wrote for the Court:

> "Clause 1 [of Art. I, § 6] defines the extent of the immunity. Its language is exact and leaves no room for a construction which would extend the privilege beyond the terms of the grant." *Id.,* at 82.

We recognize that the privilege against arrest is not identical with the Speech or Debate privilege, but it is closely related in purpose and origin. It can hardly be thought that the Speech or Debate Clause totally protects what the sentence preceding it has plainly left open to prosecution, *i. e.,* all criminal acts.

(d) MR. JUSTICE WHITE suggests that permitting the Executive to initiate the prosecution of a Member of Con-

gress for the specific crime of bribery is subject to serious potential abuse that might endanger the independence of the legislature—for example, a campaign contribution might be twisted by a ruthless prosecutor into a bribery indictment. But, as we have just noted, the Executive is not alone in possessing power potentially subject to abuse; such possibilities are inherent in a system of government that delegates to each of the three branches separate and independent powers.[16] In The Federalist

[16] The potential for harassment by an unscrupulous member of the Executive Branch may exist, but this country has no tradition of absolute congressional immunity from criminal prosecution. See *United States* v. *Quinn*, 141 F. Supp. 622 (SDNY 1956) (motion for acquittal granted because the defendant Member of Congress was unaware of receipt of fees by his law firm); *Burton* v. *United States*, 202 U. S. 344 (1906) (Senator convicted for accepting compensation to intervene before Post Office Department); *United States* v. *Dietrich*, 126 F. 671 (CC Neb. 1904) (Senator-elect's accepting payment to procure office for another not covered by statute); *May* v. *United States*, 84 U. S. App. D. C. 233, 175 F. 2d 994, cert. denied, 338 U. S. 830 (1949) (Congressman convicted of receiving compensation for services before an agency); *United States* v. *Bramblett*, 348 U. S. 503 (1955) (Congressman convicted of defrauding government agency). *Bramblett* concerned a Congressman's misuse of office funds via a "kick-back" scheme, which is surely "related" to the legislative office.

A strategically timed indictment could indeed cause serious harm to a Congressman. Representative Johnson, for example, was indicted while campaigning for re-election, and arguably his indictment contributed to his defeat. On the other hand, there is the classic case of Mayor Curley who was re-elected while under indictment. See N. Y. Times, Nov. 8, 1945, p. 12, col. 5; 4 New Catholic Encyclopedia 541 (1967). Moreover, we should not overlook the barriers a prosecutor, attempting to bring such a case, must face. First, he must persuade a grand jury to indict, and we are not prepared to assume that grand juries will act against a Member without solid evidence. Thereafter, he must convince a petit jury beyond a reasonable doubt, with the presumption of innocence favoring the accused. A prosecutor who fails to clear one of these hurdles faces serious practical consequences when the defendant is a Congressman. The Legislative Branch is not

No. 73, Hamilton expressed concern over the possible hazards that confronted an Executive dependent on Congress for financial support.

> "The Legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will as they might think proper to make him. They might, in most cases, either reduce him by famine, or tempt him by largesses, to surrender at discretion his judgment to their inclinations."

Yet Hamilton's "parade of horribles" finds little real support in history. The check-and-balance mechanism, buttressed by unfettered debate in an open society with a free press, has not encouraged abuses of power or tolerated them long when they arose. This may be explained in part because the third branch has intervened with neutral authority. See, *e. g., United States* v. *Lovett*, 328 U. S. 303 (1946). The system of divided powers was expressly designed to check the abuses England experienced in the 16th to the 18th centuries.

Probably of more importance is the public reaction engendered by any attempt of one branch to dominate or harass another. Even traditional political attempts to establish dominance have met with little success owing to contrary popular sentiment. Attempts to "purge" uncooperative legislators, for example, have not been notably successful. We are not cited to any cases in which the bribery statutes, which have been applicable to Members of Congress for over 100 years,[17]

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without weapons of its own and would no doubt use them if it thought the Executive were unjustly harassing one of its members. Perhaps more important is the omnipresence of the news media whose traditional function and competitive inclination afford no immunities to reckless or irresponsible official misconduct.

[17] The first bribery statute applicable to Congressmen was enacted in 1853. Act of Feb. 26, 1853, c. 81, § 6, 10 Stat. 171.

have been abused by the Executive Branch. When a powerful Executive sought to make the Judicial Branch more responsive to the combined will of the Executive and Legislative Branches, it was the Congress itself that checked the effort to enlarge the Court. 2 M. Pusey, Charles Evans Hughes 749–765 (1951).

We would be closing our eyes to the realities of the American political system if we failed to acknowledge that many non-legislative activities are an established and accepted part of the role of a Member, and are indeed "related" to the legislative process. But if the Executive may prosecute a Member's attempt, as in *Johnson*, to influence another branch of the Government in return for a bribe, its power to harass is not greatly enhanced if it can prosecute for a promise relating to a legislative act in return for a bribe. We therefore see no substantial increase in the power of the Executive and Judicial Branches over the Legislative Branch resulting from our holding today. If we underestimate the potential for harassment, the Congress, of course, is free to exempt its Members from the ambit of federal bribery laws, but it has deliberately allowed the instant statute to remain on the books for over a century.

We do not discount entirely the possibility that an abuse might occur, but this possibility, which we consider remote, must be balanced against the potential danger flowing from either the absence of a bribery statute applicable to Members of Congress or a holding that the statute violates the Constitution. As we noted at the outset, the purpose of the Speech or Debate Clause is to protect the individual legislator, not simply for his own sake, but to preserve the independence and thereby the integrity of the legislative process. But financial abuses by way of bribes, perhaps even more than Executive power, would gravely undermine legislative integrity and defeat the right of the

public to honest representation. Depriving the Executive of the power to investigate and prosecute and the Judiciary of the power to punish bribery of Members of Congress is unlikely to enhance legislative independence. Given the disinclination and limitations of each House to police these matters, it is understandable that both Houses deliberately delegated this function to the courts, as they did with the power to punish persons committing contempts of Congress. 2 U. S. C. § 194.

It is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts. So expressed, the privilege is broad enough to insure the historic independence of the Legislative Branch, essential to our separation of powers, but narrow enough to guard against the excesses of those who would corrupt the process by corrupting its Members. We turn next to determine whether the subject of this criminal inquiry is within the scope of the privilege.

III

An examination of the indictment brought against appellee and the statutes on which it is founded reveals that no inquiry into legislative acts or motivation for legislative acts is necessary for the Government to make out a prima facie case. Four of the five counts charge that appellee "corruptly asked, solicited, sought, accepted, received and agreed to receive" money "in return for being influenced . . . in respect to his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity." This is said to be a violation of 18 U. S. C. § 201 (c), which provides that a Member who "corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value . . . in

return for . . . (1) being influenced in his performance of any official act" is guilty of an offense.

The question is whether it is necessary to inquire into how appellee spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute. The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.

Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator. It is not an "act resulting from the nature, and in the execution, of the office." Nor is it a "thing said or done by him, as a representative, in the exercise of the functions of that office," 4 Mass., at 27. Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment. When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act as here or, as in *Johnson*, for use of a Congressman's influence with the Executive Branch. And an inquiry into the purpose of a bribe "does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them." 383 U. S., at 185.

Nor does it matter if the Member defaults on his illegal bargain. To make a prima facie case under this indictment, the Government need not show any act of appellee subsequent to the corrupt promise for payment, for it is *taking* the bribe, not performance of the illicit compact, that is a criminal act. If, for example, there were undisputed evidence that a Member took a bribe in exchange

for an agreement to vote for a given bill and if there were also undisputed evidence that he, in fact, voted against the bill, can it be thought that this alters the nature of the bribery or removes it from the area of wrongdoing the Congress sought to make a crime?

Another count of the indictment against appellee alleges that he "asked, demanded, exacted, solicited, sought, accepted, received and agreed to receive" money "for and because of official acts performed by him in respect to his action, vote and decision on postage rate legislation which had been pending before him in his official capacity . . . ." This count is founded on 18 U. S. C. § 201 (g), which provides that a Member of Congress who "asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him" is guilty of an offense. Although the indictment alleges that the bribe was given for an act that was actually performed, it is, once again, unnecessary to inquire into the act or its motivation. To sustain a conviction it is necessary to show that appellee solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation for an official act. Inquiry into the legislative performance itself is not necessary; evidence of the Member's knowledge of the alleged briber's illicit reasons for paying the money is sufficient to carry the case to the jury.

MR. JUSTICE WHITE rests heavily on the fact that the indictment charges the offense as being in part linked to Brewster's "action, vote and decision on postage rate legislation." This is true, of course, but our holding in *Johnson* precludes any showing of how he acted, voted, or decided. The dissenting position stands on the fragile proposition that it "would take the Government at its word" with respect to wanting to prove what we all agree

are protected acts that cannot be shown in evidence. Perhaps the Government would make a more appealing case if it could do so, but here, as in that case, evidence of acts protected by the Clause is inadmissible. The Government, as we have noted, need not prove any specific act, speech, debate, or decision to establish a violation of the statute under which appellee was indicted. To accept the arguments of the dissent would be to retreat from the Court's position in *Johnson* that a Member may be convicted if no showing of legislative act is required.

MR. JUSTICE BRENNAN suggests that inquiry into the alleged bribe is inquiry into the motivation for a legislative act, and it is urged that this very inquiry was condemned as impermissible in *Johnson*. That argument misconstrues the concept of motivation for legislative acts. The Speech or Debate Clause does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions. In *Johnson*, the Court held that, on remand, Johnson could be retried on the conspiracy-to-defraud count, so long as evidence concerning his speech on the House floor was not admitted. The Court's opinion plainly implies that had the Government chosen to retry Johnson on that count, he could not have obtained immunity from prosecution by asserting that the matter being inquired into was related to the motivation for his House speech. See n. 7, *supra*.

The only reasonable reading of the Clause, consistent with its history and purpose, is that it does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself. Under this indictment and these statutes no such proof is needed.

We hold that under these statutes and this indictment, prosecution of appellee is not prohibited by the Speech

or Debate Clause.[18] Accordingly, the judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS joins, dissenting.

When this case first came before the Court, I had thought it presented a single, well-defined issue—that is, whether the Congress could authorize by a narrowly drawn statute the prosecution of a Senator or Representative for conduct otherwise immune from prosecution under the Speech or Debate Clause of the Constitution. Counts 1, 3, 5, and 7 of the indictment charged Senator Brewster with receiving $19,000 "in return for being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity [as a member of the Senate Post Office Committee]." Count 9 charged the Senator with receipt of another $5,000 for acts already performed by him with respect to his "action, vote and decision" on that legislation. These charges, it seemed to me, fell within the clear prohibition of the Speech or Debate Clause as interpreted by decisions of this Court, particularly *United States* v. *Johnson*, 383 U. S. 169 (1966).

[18] In reversing the District Court's ruling that a Member of Congress may not be constitutionally tried for a violation of the federal bribery statutes, we express no views on the question left open in *Johnson* as to the constitutionality of an inquiry that probes into legislative acts or the motivation for legislative acts if Congress specifically authorizes such in a narrowly drawn statute. Should such an inquiry be made and should a conviction be sustained, then we would face the question whether inquiry into legislative acts and motivation is permissible under such a narrowly drawn statute.

For if the indictment did not call into question the "speeches or debates" of the Senator, it certainly laid open to scrutiny the motives for his legislative acts; and those motives, I had supposed, were no more subject to executive and judicial inquiry than the acts themselves, unless, of course, the Congress could delegate such inquiry to the other branches.

That, apparently, was the Government's view of the case as well. At the hearing before the District Court the prosecutor was asked point blank whether "the indictment in any wise allege[d] that Brewster did anything not related to his purely legislative functions." The prosecutor responded:

> "We are not contending that what is being charged here, that is, the activity by Brewster, was anything other than a legislative act. We are not ducking the question; it is squarely presented. They are legislative acts. We are not going to quibble over that." App. 28.

The Government, in other words, did not challenge the applicability of the Clause to these charges, but argued only that its prohibitions could be avoided, "waived" as it were, through congressional authorization in the form of a narrowly drawn bribery statute. The District Court accepted the Government's reading of the indictment and held that the Senator could not be prosecuted for this conduct even under the allegedly narrow provisions of 18 U. S. C. § 201:

> "Gentlemen, based on the facts of this case, it is admitted by the Government that the five counts of the indictment which charge Senator Brewster relate to the acceptance of bribes in connection with the performance of a legislative function by a Senator of the United States.

> "It is the opinion of this Court that the immunity under the Speech and Debate Clause of the Constitution, particularly in view of the interpretation given that Clause by the Supreme Court in Johnson, shields Senator Brewster, constitutionally shields him from any prosecution for alleged bribery to perform a legislative act." App. 33.

Furthermore, the Government's initial brief in this Court, doubtless reflecting its recognition that *Johnson* had rejected the analysis adopted by the Court today, did not argue that a prosecution for acceptance of a bribe in return for a promise to vote a certain way falls outside the prohibition of the Speech or Debate Clause. Rather, the Government's brief conceded or at least assumed that such conduct does constitute "Speech or Debate," but urged that Congress may enact a statute, such as 18 U. S. C. § 201, providing for judicial trial of the alleged crime.

Given these admissions by the Government and the District Court's construction of the indictment, which settled doctrine makes binding on this Court, *United States* v. *Jones*, 345 U. S. 377, 378 (1953), the only issue properly before us was whether Congress is empowered to delegate to the Executive and Judicial Branches the trial of a member for conduct otherwise protected by the Clause. Today, however, the Court finds it unnecessary to reach that issue, for it finds that the indictment, though charging receipt of a bribe for legislative acts, entails "no inquiry into legislative acts or motivation for legislative acts," *ante*, at 525, and thus is not covered by the Clause. In doing so the Court permits the Government to recede from its firm admissions, it ignores the District Court's binding construction of the

indictment, and—most important—it repudiates principles of legislative freedom developed over the past century in a line of cases culminating in *Johnson*. Those principles, which are vital to the right of the people to be represented by Congressmen of independence and integrity, deserve more than the hasty burial given them by the Court today. I must therefore dissent.

I

I would dispel at the outset any notion that Senator Brewster's asserted immunity strains the outer limits of the Clause. The Court writes at length in an effort to show that "Speech or Debate" does not cover "all conduct *relating* to the legislative process." *Ante*, at 515. Even assuming the validity of that conclusion, I fail to see its relevance to the instant case. Senator Brewster is not charged with conduct merely "*relating* to the legislative process," but with a crime whose proof calls into question the very motives behind his legislative acts. The indictment, then, lies not at the periphery but at the very center of the protection that this Court has said is provided a Congressman under the Clause.

Decisions of this Court dating as far back as 1881 have consistently refused to limit the concept of "legislative acts" to the "Speech or Debate" specifically mentioned in Art. I, § 6. In *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881), the Court held that:

> "It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally

> done in a session of the House by one of its members in relation to the business before it." *Id.*, at 204.

In reaching its conclusion, the Court adopted what was said by the Supreme Judicial Court of Massachusetts in *Coffin* v. *Coffin*, 4 Mass. 1 (1808), which *Kilbourn* held to be perhaps "the most authoritative case in this country on the construction of the provision in regard to freedom of debate in legislative bodies . . . ." 103 U. S., at 204. Chief Justice Parsons, speaking for the Massachusetts court, expressed what *Kilbourn* and later decisions saw as a properly generous view of the legislative privilege:

> "These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office: and I would define the article, as securing to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office; without enquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house; and I am satisfied that there are cases, in which he is entitled to this privilege, when not within the walls of the representatives' chamber." 4 Mass., at 27.

There can be no doubt, therefore, that Senator Brewster's vote on new postal rates constituted legislative activity within the meaning of the Clause. The Senator could not be prosecuted or called to answer for his vote in any judicial or executive proceeding. But the Senator's immunity, I submit, goes beyond the vote itself and precludes all extra-congressional scrutiny as to how and why he cast, or would have cast, his vote a certain way. In *Tenney* v. *Brandhove,* 341 U. S. 367 (1951), the plaintiff charged that a state legislative hearing was being conducted not for a proper legislative purpose but solely as a means of harassing him. Nevertheless the Court held that no action would lie against the committee members under federal civil rights statutes. Mr. Justice Frankfurter stated:

> "The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher* v. *Peck,* 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. . . .
>
> ". . . In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for dis-

couraging or correcting such abuses." *Id.*, at 377–378.

Barring congressional power to authorize this prosecution, what has been said thus far would seem sufficient to require affirmance of the order of dismissal, for neither Senator Brewster's vote nor his motives for voting, however dishonorable, may be the subject of a civil or criminal proceeding outside the halls of the Senate. There is nothing complicated about this conclusion. It follows simply and inescapably from prior decisions of this Court, *supra*, setting forth the most basic elements of legislative immunity. Yet the Court declines to apply those principles to this case, for it somehow finds that the Government can prove its case without referring to the Senator's official acts or motives. According to the Court, the Government can limit its proof on Counts 1, 3, 5, and 7 to evidence concerning Senator Brewster's "taking or agreeing to take money for a promise to act in a certain way," and need not show "that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise." *Ante*, at 526. Similarly, the Court finds that Count 9 can be proved merely by showing that the Senator solicited or received money "with knowledge that the donor was paying him compensation for an official act," without any inquiry "into the legislative performance itself." *Ante*, at 527. These evidentiary limitations are deemed sufficient to avoid the prohibitions of the Speech or Debate Clause.

With all respect, I think that the Court has adopted a wholly artificial view of the charges before us. The indictment alleges, not the mere receipt of money, but the receipt of money in exchange for a Senator's vote and promise to vote in a certain way. Insofar as these charges bear on votes already cast, the Government can-

not avoid proving the performance of the bargained-for acts, for it is the acts themselves, together with the motivating bribe, that form the basis of Count 9 of the indictment. Proof of "knowledge that the donor was paying . . . for an official act" may be enough for conviction under § 201 (g). But assuming it is, the Government still must demonstrate that the "official act" referred to was actually performed, for that is what the indictment charges. Count 9, in other words, calls into question both the performance of official acts by the Senator and his reasons for voting as he did. Either inquiry violates the Speech or Debate Clause.

The counts charging only a corrupt promise to vote are equally repugnant to the Clause. The Court may be correct that only receipt of the bribe, and not performance of the bargain, is needed to prove these counts. But proof of an agreement to be "influenced" in the performance of legislative acts is by definition an inquiry into their motives, whether or not the acts themselves or the circumstances surrounding them are questioned at trial. Furthermore, judicial inquiry into an alleged agreement of this kind carries with it the same dangers to legislative independence that are held to bar accountability for official conduct itself. As our Brother WHITE cogently states, *post*, at 556:

> "Bribery is most often carried out by prearrangement; if that part of the transaction may be plucked from its context and made the basis of criminal charges, the Speech or Debate Clause loses its force. It will be small comfort for a Congressman to know that he cannot be prosecuted for his vote, whatever it may be, but he can be prosecuted for an alleged agreement even if he votes contrary to the asserted bargain."

Thus, even if this were an issue of first impression, I would hold that this prosecution, being an extra-congressional inquiry into legislative acts and motives, is barred by the Speech or Debate Clause.

What is especially disturbing about the Court's result, however, is that this is not an issue of first impression, but one that was settled six years ago in *United States* v. *Johnson*, 383 U. S. 169 (1966). There a former Congressman was charged with violating the federal conflict-of-interest statute, 18 U. S. C. § 281 (1964 ed.), and with conspiring to defraud the United States, 18 U. S. C. § 371, by accepting a bribe in exchange for his agreement to seek dismissal of federal indictments pending against officers of several savings and loan companies. Part of the alleged conspiracy was a speech delivered by Johnson on the floor of the House, favorable to loan companies generally. The Government relied on that speech at trial and questioned Johnson extensively about its contents, authorship, and his reasons for delivering it. The Court of Appeals set aside the conspiracy conviction, holding that the Speech or Debate Clause barred such a prosecution based on an allegedly corrupt promise to deliver a congressional speech. In appealing that decision the Government made the very same argument that appears to persuade the Court today:

> "[The rationale of the Clause] is applicable in suits based upon the *content* of a legislator's speech or action, where immunity is necessary to prevent impediments to the free discharge of his public duties. But it does not justify granting him immunity from prosecution for accepting or agreeing to accept money to make a speech in Congress. The latter case poses no threat which could reasonably cause a Congressman to restrain himself in his official speech, because no speech, as such, is being

> questioned. It is only the *antecedent conduct* of accepting or agreeing to accept the bribe which is attacked in such a prosecution. 'Whether the party taking the bribe lives up to his corrupt promise or not is immaterial. The agreement is the essence of the offense; when that is consummated, the offense is complete.' 3 Wharton, *Criminal Law and Procedure*, § 1383 (Anderson ed. 1957) . . . . Thus, if respondent, after accepting the bribe, had failed to carry out his bargain, he could still be prosecuted for the same offense charged here, but it could not be argued that any speech was being 'questioned' in his prosecution. The fact that respondent fulfilled his bargain and delivered the corrupt speech should not render the entire course of conduct constitutionally protected." Brief for the United States in *United States* v. *Johnson*, No. 25, O. T. 1965, pp. 10–11.

The *Johnson* opinion answered this argument in two places. After emphasizing that the prosecution at issue was "based upon an allegation that a member of Congress abused his position by conspiring to give a particular speech in return for remuneration from private interests," the Court stated, 383 U. S., at 180:

> "However reprehensible such conduct may be, we believe the Speech or Debate Clause extends at least so far as to prevent it from being made the basis of a criminal charge against a member of Congress of conspiracy to defraud the United States by impeding the due discharge of government functions. *The essence of such a charge in this context is that the Congressman's conduct was improperly motivated, and . . . that is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry.*" (Emphasis supplied.)

Again, the Court stated, *id.*, at 182–183:

> "The Government argues that the clause was meant to prevent only prosecutions based upon the 'content' of speech, such as libel actions, but not those founded on 'the antecedent unlawful conduct of accepting or agreeing to accept a bribe.' Brief of the United States, at 11. Although historically seditious libel was the most frequent instrument for intimidating legislators, this has never been the sole form of legal proceedings so employed, and the language of the Constitution is framed in the broadest terms."

Finally, any doubt that the *Johnson* Court rejected the argument put forward by the Government was dispelled by its citation of *Ex parte Wason*, L. R. 4 Q. B. 573 (1869). In that case a private citizen moved to require a magistrate to prosecute several members of the House of Lords for conspiring to prevent his petition from being heard on the floor. The court denied the motion, holding that "statements made by members of either House of Parliament in their places in the House . . . could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third person. And a conspiracy to make such statements would not make the persons guilty of it amenable to the criminal law." *Id.*, at 576 (Cockburn, C. J.). Mr. Justice Blackburn added, "I entirely concur in thinking that the information did only charge an agreement to make statements in the House of Lords, and therefore did not charge any indictable offence." *Ibid.*

Johnson, then, can only be read as holding that a corrupt agreement to perform legislative acts, even if provable without reference to the acts themselves, may not be the subject of a general conspiracy prosecution.

In the face of that holding and *Johnson*'s rejection of reasoning identical to its own, the Court finds support in the fact that *Johnson* "authorized a new trial on the conspiracy count, provided that all references to the making of the speech were eliminated." *Ante*, at 511. But the Court ignores the fact that, with the speech and its motives excluded from consideration, this new trial was for nothing more than a conspiracy to intervene before an Executive Department, *i. e.*, the Justice Department. And such executive intervention has never been considered legislative conduct entitled to the protection of the Speech or Debate Clause. See *infra*, at 542. The Court cannot camouflage its departure from the holding of *Johnson* by referring to a collateral ruling having little relevance to the fundamental issues of legislative privilege involved in that case. I would follow *Johnson* and hold that Senator Brewster's alleged promise, like the Congressman's there, is immune from executive or judicial inquiry.

II

The only issue for me, then, is the one left open in *Johnson*—that is, the validity of a "prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded [not upon a general conspiracy statute but] upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." 383 U. S., at 185. Assuming that 18 U. S. C. § 201 is such a "narrowly drawn statute," I do not believe that it, any more than a general enactment, can serve as the instrument for holding a Congressman accountable for his legislative acts outside the confines of his own chamber. The Government offers several reasons why such a "waiver" of legislative immunity should be allowed. None of these, it seems to me, is sufficient to override

the public's interest in legislative independence, secured to it by the principles of the Speech or Debate Clause.[1]

As a preliminary matter, the Government does not contend, nor can it, that no forum was provided in which Senator Brewster might have been punished if guilty. Article I, § 5, of the Constitution provides that "[e]ach House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member." This power has a broad reach, extending "to all cases where the offence is such as in the judgment of the [House or] Senate is inconsistent with the trust and duty of a member." *In re Chapman*, 166 U. S. 661, 669–670 (1897). *Chapman*, for example, concerned a Senate investigation of charges that Senate members had speculated in stocks of companies interested in a pending tariff bill. Similarly, the House of Representatives in 1873 censured two members for accepting stock to forestall a congressional inquiry into the Credit Mobilier. There are also many instances of imprisonment or expulsion by Parliament of members who accepted bribes.[2]

Though conceding that the Houses of Congress are empowered to punish their members under Art. I, § 5, the Government urges that Congress may also enact a statute, such as 18 U. S. C. § 201, providing for judicial enforcement of that power. In support of this position, the Government relies primarily on the following language from the opinion in *Burton* v. *United States*, 202 U. S. 344, 367 (1906):

"While the framers of the Constitution intended

[1] Although the Court does not reach this issue, it adopts many of the Government's arguments to show that the Speech or Debate Clause is or should be wholly inapplicable to this case. My disagreement with these contentions applies equally to their use by the Court in support of its position.

[2] See n. 4, *infra*, and accompanying text.

> that each Department should keep within its appointed sphere of public action, it was never contemplated that the authority of the Senate to admit to a seat in its body one who had been duly elected as a Senator, or its power to expel him after being admitted, should, in any degree, limit or restrict the authority of Congress to enact such statutes, not forbidden by the Constitution, as the public interests required for carrying into effect the powers granted to it."

However, *Burton* was not a case that involved conduct protected by the Speech or Debate Clause. Senator Burton was prosecuted for accepting money to influence the Post Office Department in a mail fraud case in violation of Rev. Stat. § 1782, 13 Stat. 123. That was nonlegislative conduct, and as we said in *Johnson, supra,* at 172 "[n]o argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process." Such a prosecution, as the quoted excerpt from *Burton* specifically said, is "not forbidden by the Constitution," but that holding has little relevance to a case, such as this one, involving legislative acts and motives.

The Government, however, cites additional considerations to support the authority of Congress to provide for judicial trials of corrupt Members; the press of congressional business, the possibility of politically motivated judgments by fellow Members, and the procedural safeguards of a judicial trial are all cited as reasons why Congress should be allowed to transfer the trial of a corrupt Member from the Houses of Congress to the courts. Once again, these are arguments urged and found unpersuasive in *Johnson.* I find them no more

persuasive now. I may assume as a general matter that the "Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." *United States* v. *Brown*, 381 U. S. 437, 445 (1965). Yet it does not necessarily follow that prosecutors, judges, and juries are better equipped than legislators to make the kinds of political judgments required here. Senators and Congressmen are never entirely free of political pressures, whether from their own constituents or from special-interest lobbies. Submission to these pressures, in the hope of political and financial support, or the fear of its withdrawal, is not uncommon, nor is it necessarily unethical.[3] The line between legitimate influence and outright bribe may be more a matter of emphasis than objective fact, and in the end may turn on the trier's view of what was proper in the context of the everyday realities and necessities of political office. Whatever the special competence of the judicial process

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[3] Cf. Conflict of Interest and Federal Service, Association of the Bar of the City of New York 14–15 (1960):

"The congressman's representative status lies at the heart of the matter. As a representative, he is often supposed to represent a particular economic group, and in many instances his own economic self-interest is closely tied to that group. That is precisely why it selected him. It is common to talk of the Farm Bloc, or the Silver Senators. We would think odd a fishing state congressman who was not mindful of the interests of the fishing industry—though he may be in the fishing business himself, and though his campaign funds come in part from this source. This kind of representation is considered inevitable and, indeed, generally applauded. Sterile application of an abstract rule against acting in situations involving self-interest would prevent the farmer senator from voting on farm legislation or the Negro congressman from speaking on civil rights bills. At some point a purist attitude toward the evils of conflicts of interest in Congress runs afoul of the basic premises of American representative government."

in other areas, members of Congress themselves are likely to be in the better position to judge the issue of bribery relating to legislative acts. The observation of Mr. Justice Frankfurter bears repeating here: "Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses." *Tenney* v. *Brandhove*, 341 U. S., at 378.

Nor is the Member at the mercy of his colleagues, free to adjust as they wish his rights to due process and free expression. It is doubtful, for example, that the Congress could punish a Member for the mere expression of unpopular views otherwise protected by the First Amendment. See *Bond* v. *Floyd*, 385 U. S. 116 (1966). And judicial review of the legislative inquiry is not completely foreclosed; the power of the House and Senate to discipline the conduct of Members is not exempt from the "restraints imposed by or found in the implications of the Constitution." *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 614 (1929), quoted in *Powell* v. *McCormack*, 395 U. S. 486, 519 n. 40 (1969).

Finally, the Government relies on the history of the Clause to support a congressional power of delegation. While agreeing that the Speech or Debate Clause was a "culmination of a long struggle for parliamentary supremacy" and a reaction against the Crown's use of "criminal and civil law to suppress and intimidate critical legislators," *Johnson*, *supra*, at 178, the Government urges that this is not the whole story. It points out that while a large part of British history was taken up with Parliament's struggles to free itself from royal domination, the balance of power was not always ranged against it. Once Parliament succeeded in asserting rightful dominion over its members and the conduct of its business, Parliament sought to extend its reach

into areas and for purposes that can only be labeled an abuse of legislative power. Aware of these abuses, the Framers, the Government submits, did not mean Congress to have exclusive power, but one which, by congressional delegation, might be shared with the Executive and Judicial Branches.

That the Parliamentary privilege was indeed abused is historical fact. By the close of the 17th century, Parliament had succeeded in obtaining rights of free speech and debate as well as the power to punish offenses of its members contravening the good order and integrity of its processes. In 1694, five years after incorporation of the Speech or Debate Clause in the English Bill of Rights, Lord Falkland was found guilty in Commons of accepting a bribe of 2,000 pounds from the Crown, and was imprisoned during the pleasure of the House. The Speaker of the House of Commons, Sir John Trevor, was censured for bribery the following year.[4]

But Parliament was not content with mere control over its members' conduct. Independence brought an assertion of absolute power over the definition and reach of institutional privileges. "[T]he House of Commons and the House of Lords claimed absolute and plenary authority over their privileges. This was an independent body of law, described by Coke as *lex parliamenti*. Only Parliament could declare what those privileges were or what new privileges were occasioned, and only Parliament could judge what conduct constituted a breach of privilege." *Watkins* v. *United States*, 354 U. S. 178, 188 (1957). Thus, having established the basic privilege of its members

[4] R. Luce, Legislative Assemblies 401–402 (1924). Another notable instance was that of Robert Walpole, who in 1711 was expelled and imprisoned by the House on charges of corruption. T. Taswell-Langmead's English Constitutional History 583–584 (11th ed., T. Plucknett, 1960).

to be free from civil arrest or punishment, the House extended the privilege to its members' servants, and punished trespass on the estates of its members, or theft of their or their servants' goods. The House went so far as to declare its members' servants to be outside the reach of the common-law courts during the time that Parliament was sitting. This led to the sale of "protections" providing that named persons were servants of a particular member and should be free from arrest, imprisonment, and molestation during the term of Parliament.[5] These abuses in turn were brought to America. By 1662, for example, the Virginia House of Burgesses had succeeded in exempting not only its members, but their servants as well, from arrest and molestation.[6]

The Government is correct in pointing out that the Framers, aware of these abuses, were determined to guard against them. Madison stated that the "legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex." [7] And Jefferson looked on the "tyranny of the

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[5] C. Wittke, The History of English Parliamentary Privilege 39–47 (1921); Taswell-Langmead, *supra*, at 580. The abuse of the privilege lay as much in its arbitrary contraction as extension. In 1763 the House of Commons reacted angrily to a tract written by one of its own members, John Wilkes, and withdrew the privilege from him in order to permit his prosecution for seditious libel. The House also expelled Wilkes, and he fled to France as an outlaw. Upon his return to England in 1768, he was re-elected to Parliament, again expelled, tried for seditious libel, and sentenced to 22 months' imprisonment. The House refused to seat him on three further occasions, and it was not until 1782 that the resolutions expelling Wilkes and declaring him incapable of re-election were expunged from the records of the House. Taswell-Langmead, *supra*, at 584–585; *Powell* v. *McCormack*, 395 U. S. 486, 527–528 (1969).

[6] M. Clarke, Parliamentary Privilege in the American Colonies 99 (1943).

[7] The Federalist No. 48.

legislatures" as "the most formidable dread at present, and will be for long years." [8] Therefore the Framers refused to adopt the *lex parliamenti,* which would have allowed Congressmen and their servants to enjoy numerous immunities from ordinary legal restraints. But it does not follow that the Framers went further and authorized Congress to transfer discipline of bribe takers to the Judicial Branch. The Government refers us to nothing in the Convention debates or in writings of the Framers that even remotely supports the argument. Indeed there is much in the history of the Clause to point the other way, toward a personalized legislative privilege not subject to defeasance even by a specific congressional delegation to the courts.

The *Johnson* opinion details the history. The Clause was formulated by the Convention's Committee on Style, which phrased it by revising Article V of the Articles of Confederation which had provided: "Freedom of speech and debate in Congress shall not be impeached or questioned *in any court,* or place out of Congress." (Emphasis supplied.) This wording derived in turn from the provision of the English Bill of Rights of 1689 that "Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned *in any Court or Place out of Parliament.*" (Emphasis supplied.) The same wording, or variations of it, appeared in state constitutions. Article VIII of the Maryland Declaration of Rights (1776) declared that legislative freedom "ought not to be impeached in any other court or judicature." The Massachusetts Bill of Rights (Art. XXI, 1780) provided that the "freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution,

[8] *Tenney* v. *Brandhove,* 341 U. S. 367, 375 n. 4 (1951).

action or complaint, in any other court or place whatsoever." The New Hampshire Constitution (Art. XXX, 1784) contained a provision virtually identical to Massachusetts'. In short "[f]reedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." *Tenney* v. *Brandhove*, 341 U. S., at 372.

Despite his fear of "legislative excess," *Tenney* v. *Brandhove*, *supra*, at 375, Jefferson, when confronted with criticism of certain Congressmen by the Richmond, Virginia, grand jury, said:

> "[T]hat in order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive." 8 The Works of Thomas Jefferson 322 (Ford ed. 1904).

Jefferson's point of view was shared by his contemporaries [9] and found judicial expression as early as 1808, in the *Coffin* opinion, *supra*. It was there stated:

> "In considering this article, it appears to me that the privilege secured by it is not so much the privilege of the house as an organized body, as of each individual member composing it, who is entitled to

[9] James Wilson, a member of the Convention committee responsible for the Clause, stated: "In order to enable and encourage a representative of the publick to discharge his publick trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." 1 The Works of James Wilson 421 (R. McCloskey ed. 1967).

> this privilege, *even against the declared will of the house.* For he does not hold this privilege at the pleasure of the house; but derives it from the will of the people, expressed in the constitution, which is paramount to the will of either or both branches of the legislature. In this respect the privilege here secured resembles other privileges attached to each member by another part of the constitution, by which he is exempted from arrests on *mesne* (or original) process, during his going to, returning from, or attending the general court. Of these privileges, thus secured to each member, he cannot be deprived, by a resolve of the house, or by an act of the legislature." 4 Mass., at 27. (Emphasis supplied.)

In short, if the Framers contemplated judicial inquiry into legislative acts, even on the specific authorization of Congress, that intent is not reflected in the language of the Speech or Debate Clause or contemporary understanding of legislative privilege. History certainly shows that the Framers feared unbridled legislative power. That fact, however, yields no basis for an interpretation that in Art. I, §§ 1 and 8, the Framers authorized Congress to ignore the prohibition against inquiry in "any other place" and enact a statute either of general application or specifically providing for a trial in the courts of a member who takes a bribe for conduct related to legislative acts.[10]

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[10] While it is true that Congress has made the acceptance of a bribe a crime ever since 1853, it should be noted that the earliest federal bribery statute, passed by Congress in 1790, applied only to judges who took bribes in exchange for an "opinion, judgment or decree." Act of April 30, 1790, 1 Stat. 112, 117. It also appears that the common law did not recognize the charge of bribe-taking by a legislator. Blackstone, for example, defined bribery as "when a judge, or other person concerned in the administration of justice,

III

I yield nothing to the Court in conviction that this reprehensible and outrageous conduct, if committed by the Senator, should not have gone unpunished. But whether a court or only the Senate might undertake the task is a constitutional issue of portentous significance, which must of course be resolved uninfluenced by the magnitude of the perfidy alleged. It is no answer that Congress assigned the task to the judiciary in enacting 18 U. S. C. § 201. Our duty is to Nation and Constitution, not Congress. We are guilty of a grave disservice to both Nation and Constitution when we permit Congress to shirk its responsibility in favor of the courts. The Framers' judgment was that the American people could have a Congress of independence and integrity only if alleged misbehavior in the performance of legislative functions was accountable solely to a Member's own House and never to the executive or judiciary. The passing years have amply justified the wisdom of that judgment. It is the Court's duty to enforce the letter of the Speech or Debate Clause in that spirit. We did so in deciding *Johnson*. In turning its back on that decision today, the Court arrogates to the judiciary an authority committed by the Constitution, in Senator Brewster's case, exclusively to the Senate of the United States. Yet the Court provides no principled justification, and I can think of none, for its denial that *United States* v. *Johnson* compels affirmance of the District Court. That decision is only six years old and bears the indelible imprint of the distinguished constitutional scholar who wrote the opinion for the Court. *Johnson* surely merited a longer life.

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takes any undue reward to influence his behaviour in his office." 4 W. Blackstone, Commentaries *139. Coke also regarded bribery as a crime committed by judges. Coke, Third Institute c. 68, ¶¶ 1–2.

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

The question presented by this case is not whether bribery or other offensive conduct on the part of Members of Congress must or should go unpunished. No one suggests that the Speech or Debate Clause insulates Senators and Congressmen from accountability for their misdeeds. Indeed, the Clause itself is but one of several constitutional provisions that make clear that Congress has broad powers to try and punish its Members:

> "[T]he Constitution expressly empowers each House to punish its own members for disorderly behavior. We see no reason to doubt that this punishment may in a proper case be imprisonment, and that it may be for refusal to obey some rule on that subject made by the House for the preservation of order.
>
> "So, also, the penalty which each House is authorized to inflict in order to compel the attendance of absent members may be imprisonment, and this may be for a violation of some order or standing rule on that subject.
>
> "Each House is by the Constitution made the judge of the election and qualification of its members. In deciding on these it has an undoubted right to examine witnesses and inspect papers, subject to the usual rights of witnesses in such cases; and it may be that a witness would be subject to like punishment at the hands of the body engaged in trying a contested election, for refusing to testify, that he would if the case were pending before a court of judicature.
>
> "The House of Representatives has the sole right to impeach officers of the government, and the Senate to try them. Where the question of such impeachment is before either body acting in its ap-

> propriate sphere on that subject, we see no reason to doubt the right to compel the attendance of witnesses, and their answer to proper questions, in the same manner and by the use of the same means that courts of justice can in like cases." *Kilbourn* v. *Thompson,* 103 U. S. 168, 189–190 (1881).

The sole issue here is in what forum the accounting must take place—whether the prosecution that the Government proposes is consistent with the command that "for any Speech or Debate in either House, they [Members of Congress] shall not be questioned in any other Place." U. S. Const., Art. I, § 6, cl. 1.

The majority disposes of this issue by distinguishing between promise and performance. Even if a Senator or Congressman may not be prosecuted for a corrupt legislative act, the Speech or Debate Clause does not prohibit prosecution for a corrupt promise to perform that act. If a Member of Congress promises to vote for or against a bill in return for money, casts his vote in accordance with the promise and accepts payment, the majority's view is that even though he may not be prosecuted for voting as he did, although the vote was corrupt, the executive may prosecute and the judiciary may try him for the corrupt agreement or for taking the money either under a narrowly drawn statute or one of general application. This distinction between a promise and an act will not withstand scrutiny in terms of the values that the Speech or Debate Clause was designed to secure.

The majority agrees that in order to assure the independence and integrity of the legislature and to reinforce the separation of powers so deliberately established by the Founders, the Speech or Debate Clause prevents a legislative act from being the basis of criminal or civil liability. Concededly, a Member of Congress may not be prosecuted or sued *for* making a speech or voting in

committee or on the floor, whether he was paid to do so or not. The majority also appears to embrace the holding in *United States* v. *Johnson*, 383 U. S. 169 (1966), that a Member of Congress could not be convicted of a conspiracy to defraud the Government where the purposes or motives underlying his conduct as a legislator are called into question. If one follows the mode of the majority's present analysis, the prosecution in *Johnson* was not for speaking, voting, or performing any other legislative act in a particular manner; the criminal act charged was a conspiracy to defraud the United States anterior to any legislative performance. To prove the crime, however, the prosecution introduced evidence that money was paid to make a speech, among other things, and that the speech was made. This, the Court held, violated the Speech or Debate Clause, because it called into question the motives and purposes underlying Congressman Johnson's performance of his legislative duties.

The same infirmity inheres in the present indictment, which was founded upon two separate statutes. Title 18 U. S. C. § 201 (g) requires proof of a defendant's receipt, or an agreement or attempt to receive, anything of value "for or because of any official act performed or to be performed by him . . . ." Of course, not all, or even many, official acts would be legislative acts protected by the Speech or Debate Clause; but whatever the act, the Government must identify it to prove its case. Here we are left in no doubt whatsoever, for the official acts expressly charged in the indictment were in respect to "his action, vote and decision on postage rate legislation." Similarly, there is no basis for arguing that the indictment did not contemplate proof of performance of the act, for the indictment in so many words charged the arrangement was "for and because of official acts *performed* by him in respect to his action, vote and decision on postage rate legislation which *had been pending* before

him in his official capacity." (Emphasis added.) It is this indictment, not some other charge, that was challenged and dismissed by the District Court. Like that court, I would take the Government at its word: it alleged and intended to prove facts that questioned and impugned the motives and purposes underlying specified legislative acts of the Senator and intended to use these facts as a basis for the conviction of the Senator himself. Thus, taking the charge at face value, the indictment represents an attempt to prosecute and convict a Member of Congress not only for taking money but also *for* performing a legislative act. Moreover, whatever the proof might be, the indictment on its face charged a corrupt undertaking with respect to the performance of legislative conduct that had already occurred and so, without more, "questioned in [some] other Place" the speech and debate of a Member of Congress. Such a charge is precisely the kind that the Senator should not have been called upon to answer if the Speech or Debate Clause is to fulfill its stated purpose.

Insofar as it charged crimes under 18 U. S. C. § 201 (c)(1), the indictment fares little better. That section requires proof of a corrupt arrangement for the receipt of money and also proof that the arrangement was in return for the defendant "being influenced in his performance of any official act . . . ." Whatever the official act may prove to be, the Government cannot prove its case without calling into question the motives of the Member in performing that act, for it must prove that the Member undertook for money to be influenced in that performance. Clearly, if the Government sought to prove its case against a Member of Congress by evidence of a legislative act, conviction could not survive in the face of the holding in *Johnson*. But even if an offense under the statute could be established merely by proof of an undertaking to cast a vote, which is not alleged in the indictment or

shown at trial to have taken place one way or the other, the motives of the legislator in performing his duties with respect to the subject matter of the undertaking would nevertheless inevitably be implicated. In charging the offense under § 201 (c)(1), the indictment alleged a corrupt arrangement made "in return for being influenced in his performance of official acts in respect to his action, vote, and decision on postage legislation which might at any time be pending before him in his official capacity." Again, I would take the Government at its word: it charged and intended to prove facts that could not fail to implicate Senator Brewster's performance of his legislative duties.*

The use of criminal charges "against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege," *United States* v. *Johnson,* 383 U. S., at 182 (1966), and in applying the privilege "we look particularly to the prophylactic purposes of the clause." *Ibid.* Let us suppose that the Executive Branch is informed that private interests are paying a Member of Congress to oppose administration-sponsored legislation. The Congressman is chairman of a key committee where a vote is pending. A representative from the Executive Branch informs the Congressman of the allegations against him, hopes the charges are not true, and expresses confidence that the committee will report the bill and that the Member will support it on the floor. The pressure on the Congressmen, corrupt or not, is undeniable. He

*In *Gravel* v. *United States, post,* p. 606, it is held that the Speech or Debate Clause does not immunize criminal acts performed in preparation for or execution of a legislative act. But the unprotected acts referred to there were criminal in themselves, provable without reference to a legislative act and without putting the defendant Member to the task of defending the integrity of his legislative performance. Here, as stated, the crime charged necessarily implicates the Member's legislative duties.

will clearly fare better in any future criminal prosecution if he answers the charge of corruption with evidence that he voted contrary to the alleged bargain. Even more compelling is the likelihood that he will not be prosecuted at all if he follows the administration's suggestion and supports the bill. Putting aside the potential for abuse in ill-conceived, mistaken, or false accusations, the Speech or Debate Clause was designed to prevent just such an exercise of executive power. It is no answer to maintain that the potential for abuse does not inhere in a prosecution for a completed bribery transaction where the legislative act has already occurred. A corrupt vote may not be made the object of a criminal prosecution because otherwise the Executive would be armed with power to control the vote in question, if forewarned, or in any event to control other legislative conduct.

All of this comes to naught if the executive may prosecute for a promise to vote though not for the vote itself. The same hazards to legislative independence inhere in the two prosecutions. Bribery is most often carried out by prearrangement; if that part of the transaction may be plucked from its context and made the basis of criminal charges, the Speech or Debate Clause loses its force. It will be small comfort for a Congressman to know that he cannot be prosecuted for his vote, whatever it may be, but he can be prosecuted for an alleged agreement even if he votes contrary to the asserted bargain.

The realities of the American political system, of which the majority fails to take account, render particularly illusory a Speech or Debate Clause distinction between a promise to perform a legislative act and the act itself. Ours is a representative government. Candidates for office engage in heated contests and the victor is he who receives the greatest number of votes from his constituents. These campaigns are run on

platforms that include statements of intention and undertakings to promote certain policies. These promises are geared, at least in part, to the interests of the Congressman's constituency. Members of Congress may be legally free from dictation by the voters, but there is a residual conviction that they should have due regard for the interests of their States or districts, if only because on election day a Member is answerable for his conduct.

Serving constituents is a crucial part of a legislator's ongoing duties. Congressmen receive a constant stream of complaints and requests for help or service. Judged by the volume and content of a Congressman's mail, the right to petition is neither theoretical nor ignored. It has never been thought unethical for a Member of Congress whose performance on the job may determine the success of his next campaign not only to listen to the petitions of interest groups in his State or district, which may come from every conceivable group of people, but also to support or oppose legislation serving or threatening those interests.

Against this background a second fact of American political life assumes considerable importance for the purposes of this case. Congressional campaigns are most often financed with contributions from those interested in supporting particular Congressmen and their policies. A legislator must maintain a working relationship with his constituents not only to garner votes to maintain his office but to generate financial support for his campaigns. He must also keep in mind the potential effect of his conduct upon those from whom he has received financial support in the past and those whose help he expects or hopes to have in the next campaign. An expectation or hope of future assistance can arise because constituents have indicated that support will be forthcoming if the Member of Congress champions their point of view.

Financial support may also arrive later from those who approve of a Congressman's conduct and have an expectation it will continue. Thus, mutuality of support between legislator and constituent is inevitable. Constituent contributions to a Congressman and his support of constituent interests will repeatedly coincide in time or closely follow one another. It will be the rare Congressman who never accepts campaign contributions from persons or interests whose view he has supported or will support, by speech making, voting, or bargaining with fellow legislators.

All of this, or most of it, may be wholly within the law and consistent with contemporary standards of political ethics. Nevertheless, the opportunities for an Executive, in whose sole discretion the decision to prosecute rests under the statute before us, to claim that legislative conduct has been sold are obvious and undeniable. These opportunities, inherent in the political process as it now exists, create an enormous potential for executive control of legislative behavior by threats or suggestions of criminal prosecution—precisely the evil that the Speech or Debate Clause was designed to prevent.

Neither the majority opinion nor the statute under which Brewster is charged distinguishes between campaign contributions and payments designed for or put to personal use. To arm the Executive with the power to prosecute for taking political contributions in return for an agreement to introduce or support particular legislation or policies is to vest enormous leverage in the Executive and the courts. Members of Congress may find themselves in the dilemma of being forced to conduct themselves contrary to the interests of those who provide financial support or declining that support. They may also feel constrained to listen less often to the entreaties and demands of potential contributors. The threat of prosecution for supposed missteps that

are difficult to define and fall close to the line of what ordinarily is considered permissible, even necessary, conduct scarcely ensures that legislative independence that is the root of the Speech or Debate Clause.

Even if the statute and this indictment were deemed limited to payments clearly destined for, or actually put to, personal use in exchange for a promise to perform a legislative act, the Speech or Debate Clause would still be offended. The potential for executive harassment is not diminished merely because the conduct made criminal is more clearly defined. A Member of Congress becomes vulnerable to abuse each time he makes a promise to a constituent on a matter over which he has some degree of legislative power, and the possibility of harassment can inhibit his exercise of power as well as his relations with constituents. In addition, such a prosecution presents the difficulty of defining when money obtained by a legislator is destined for or has been put to personal use. For the legislator who uses both personal funds and campaign contributions to maintain himself in office, the choice of which to draw upon may have more to do with bookkeeping than bribery; yet any interchange of funds would certainly render his conduct suspect. Even those Members of Congress who keep separate accounts for campaign contributions but retain unrestricted drawing rights would remain open to a charge that the money was in fact for personal use. In both cases, the possibility of a bribery prosecution presents the problem of determining exactly those purposes for which campaign contributions can legitimately be used. The difficulty of drawing workable lines enhances the prospects for executive control and correspondingly diminishes congressional freedom of action.

The majority does not deny the potential for executive control that inheres in sanctioning this prosecution. Instead, it purports to define the problem away by assert-

ing that the Speech or Debate Clause reaches only prosecutions for legislative conduct and that a promise to vote for a bill, as distinguished from the vote itself, does not amount to a legislative act. The implication is that a prosecution based upon a corrupt promise no more offends the Speech or Debate Clause than the prosecution of a Congressman for assault, robbery, or murder. The power to prosecute may threaten legislative independence but the Constitution does not for that reason forbid it. I find this unpersuasive.

The fact that the Executive may prosecute Members of Congress for ordinary criminal conduct, which surely he can despite the potential for influencing legislative conduct, cannot itself demonstrate that prosecutions for corrupt promises to perform legislative acts would be equally constitutional. The argument proves too much, for it would as surely authorize prosecutions for the legislative act itself. Moreover, there is a fundamental difference in terms of potential abuse between prosecutions for ordinary crime and those based upon a promise to perform a legislative act. Even the most vocal detractor of Congress could not accurately maintain that the Executive would often have credible basis for accusing a member of Congress of murder, theft, rape, or other such crimes. But the prospects for asserting an arguably valid claim are far wider in scope for an Executive prone to fish in legislative waters and to search for correlations between legislative performance and financial support. The possibilities are indeed endless, as is the potential for abuse.

The majority ignores another vital difference between executive authority to prosecute for ordinary crime and the power to challenge undertakings or conspiracies to corrupt the legislative process. In a prosecution for drunken driving or assault, the manner in which a Congressman performed his legislative tasks is quite irrele-

vant to either prosecution or defense. In the trial of a Congressman for making a corrupt promise to vote, on the other hand, proof that his vote was in fact contrary to the terms of the alleged bargain will make a strong defense. See *United States* v. *Johnson,* 383 U. S., at 176–177. A Congressman who knows he is under investigation for a corrupt undertaking will be well advised to conduct his affairs in a manner wholly at odds with the theory of the charge which may be lodged against him. As a practical matter, to prosecute a Congressman for agreeing to accept money in exchange for a promise to perform a legislative act inherently implicates legislative conduct. And to divine a distinction between promise and performance is wholly at odds with protecting that legislative independence that is the heart of the Speech or Debate Clause.

Congress itself clearly did not make the distinction that the majority finds dispositive. The statute before us is a comprehensive effort to sanitize the legislative environment. It expressly permits prosecutions of members of Congress for voting or promising to vote in exchange for money. The statute does not concern itself with murder or other undertakings unrelated to the legislative process. Congress no doubt believed it consistent with the Speech or Debate Clause to authorize executive prosecutions for corrupt voting. Equally obvious is the fact that Congress drew no distinction in legislative terms between prosecutions based upon voting and those based upon motivations underlying legislative conduct.

The arguments that the majority now embraces were the very contentions that the Government made in *United States* v. *Johnson, supra.* In rejecting those arguments on the facts of that case, where legislative conduct as well as a prior conspiracy formed a major part of the Government's proof, the Court referred with

approval to *Ex parte Wason*, L. R. 4 Q. B. 573 (1869), in which the question was whether members of the House of Lords could be prosecuted for a conspiracy to prevent presentation of a petition on the floor of Lords. *Johnson, supra*, at 183, sets out the reaction of the English court:

> "The court denied the motion, stating that statements made in the House 'could not be made the foundation of civil or criminal proceedings . . . . And a conspiracy to make such statements would not make the person guilty of it amenable to the criminal law.' *Id.*, at 576. (Cockburn, C. J.) Mr. Justice Lush added, 'I am clearly of opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House.' *Id.*, at 577."

The *Wason* court clearly refused to distinguish between promise and performance; the legislative privilege applied to both. Mr. Justice Harlan, writing for the Court in *Johnson*, took no issue with this position. Indeed, he indicated that the Speech or Debate Clause barred any prosecution under a general statute where there is drawn in question "the legislative acts of . . . the member of Congress *or his motives for performing them.*" 383 U. S., at 185 (emphasis added). I find it difficult to believe that under the statute there involved the *Johnson* Court would have permitted a prosecution based upon a promise to perform a legislative act.

Because it gives a begrudging interpretation to the clause, the majority finds it can avoid dealing with the position upon which the Government placed principal reliance in its brief in this Court. *Johnson* put aside the question whether an otherwise impermissible prosecution

conducted pursuant to a statute such as we now have before us—a statute specifically including congressional conduct and purporting to be an exercise of congressional power to discipline its Members—would be consistent with the Speech or Debate Clause. As must be apparent from what so far has been said, I am convinced that such a statute contravenes the letter and purpose of the Clause. True, Congress itself has defined the crime and specifically delegated to the Executive the discretion to prosecute and to the courts the power to try. Nonetheless, I fail to understand how a majority of Congress can bind an objecting Congressman to a course so clearly at odds with the constitutional command that legislative conduct shall be subject to question in no place other than the Senate or the House of Representatives. The Speech or Debate Clause is an allocation of power. It authorizes Congress to call offending members to account in their appropriate Houses. A statute that represents an abdication of that power is in my view impermissible.

I return to the beginning. The Speech or Debate Clause does not immunize corrupt Congressmen. It reserves the power to discipline in the Houses of Congress. I would insist that those Houses develop their own institutions and procedures for dealing with those in their midst who would prostitute the legislative process.

BOARD OF REGENTS OF STATE COLLEGES ET AL. *v.* ROTH

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 71–162. Argued January 18, 1972—Decided June 29, 1972

Respondent, hired for a fixed term of one academic year to teach at a state university, was informed without explanation that he would not be rehired for the ensuing year. A statute provided that all state university teachers would be employed initially on probation and that only after four years' continuous service would teachers achieve permanent employment "during efficiency and good behavior," with procedural protection against separation. University rules gave a nontenured teacher "dismissed" before the end of the year some opportunity for review of the "dismissal," but provided that no reason need be given for nonretention of a nontenured teacher, and no standards were specified for reemployment. Respondent brought this action claiming deprivation of his Fourteenth Amendment rights, alleging infringement of (1) his free speech right because the true reason for his nonretention was his criticism of the university administration, and (2) his procedural due process right because of the university's failure to advise him of the reason for its decision. The District Court granted summary judgment for the respondent on the procedural issue. The Court of Appeals affirmed. *Held:* The Fourteenth Amendment does not require opportunity for a hearing prior to the nonrenewal of a nontenured state teacher's contract, unless he can show that the nonrenewal deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, despite the lack of tenure or a formal contract. Here the nonretention of respondent, absent any charges against him or stigma or disability foreclosing other employment, is not tantamount to a deprivation of "liberty," and the terms of respondent's employment accorded him no "property" interest protected by procedural due process. The courts below therefore erred in granting summary judgment for the respondent on the procedural due process issue. Pp. 569–579.

446 F. 2d 806, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 603. DOUGLAS, J., filed a dissenting opinion, *post*, p. 579. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS, J., joined, *post*, p. 604. MARSHALL, J., filed a dissenting opinion, *post*, p. 587. POWELL, J., took no part in the decision of the case.

Charles A. Bleck, Assistant Attorney General of Wisconsin, argued the cause for petitioners. With him on the brief were *Robert W. Warren*, Attorney General, and *Robert D. Martinson*, Assistant Attorney General.

Steven H. Steinglass argued the cause for respondent. With him on the brief were *Robert L. Reynolds, Jr.*, *Richard Perry*, and *Richard M. Klein*.

Briefs of *amici curiae* urging reversal were filed by *Robert H. Quinn*, Attorney General, *Walter H. Mayo III*, Assistant Attorney General, and *Morris M. Goldings* for the Commonwealth of Massachusetts; by *Evelle J. Younger*, Attorney General of California, *Elizabeth Palmer*, Acting Assistant Attorney General, and *Donald B. Day*, Deputy Attorney General, for the Board of Trustees of the California State Colleges; by *J. Lee Rankin* and *Stanley Buchsbaum* for the City of New York; and by *Albert E. Jenner, Jr.*, *Chester T. Kamin*, and *Richard T. Dunn* for the American Council on Education et al.

Briefs of *amici curiae* urging affirmance were filed by *David Rubin*, *Michael H. Gottesman*, *George H. Cohen*, and *Warren Burnett* for the National Education Association et al.; by *Herman I. Orentlicher* and *William W. Van Alstyne* for the American Association of University Professors; by *John Ligtenberg* and *Andrew J. Leahy* for the American Federation of Teachers; and by *Richard L. Cates* for the Wisconsin Education Association.

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1968 the respondent, David Roth, was hired for his first teaching job as assistant professor of political science at Wisconsin State University-Oshkosh. He was hired for a fixed term of one academic year. The notice of his faculty appointment specified that his employment would begin on September 1, 1968, and would end on June 30, 1969.[1] The respondent completed that term. But he was informed that he would not be rehired for the next academic year.

The respondent had no tenure rights to continued employment. Under Wisconsin statutory law a state university teacher can acquire tenure as a "permanent" employee only after four years of year-to-year employment. Having acquired tenure, a teacher is entitled to continued employment "during efficiency and good behavior." A relatively new teacher without tenure, however, is under Wisconsin law entitled to nothing beyond his one-year appointment.[2] There are no statu-

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[1] The respondent had no contract of employment. Rather, his formal notice of appointment was the equivalent of an employment contract.

The notice of his appointment provided that: *"David F. Roth* is hereby appointed to the faculty of the Wisconsin State University Position number 0262. (Location:) *Oshkosh* as (Rank:) *Assistant Professor* of (Department:) *Political Science* this (Date:) *first* day of (Month:) *September* (Year:) *1968."* The notice went on to specify that the respondent's "appointment basis" was for the "academic year." And it provided that "[r]egulations governing tenure are in accord with Chapter 37.31, Wisconsin Statutes. The employment of any staff member for an academic year shall not be for a term beyond June 30th of the fiscal year in which the appointment is made." See n. 2, *infra*.

[2] Wis. Stat. § 37.31 (1) (1967), in force at the time, provided in pertinent part that:

"All teachers in any state university shall initially be employed

tory or administrative standards defining eligibility for re-employment. State law thus clearly leaves the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of university officials.

The procedural protection afforded a Wisconsin State University teacher before he is separated from the University corresponds to his job security. As a matter of statutory law, a tenured teacher cannot be "discharged except for cause upon written charges" and pursuant to certain procedures.[3] A nontenured teacher, similarly, is protected to some extent *during* his one-year term. Rules promulgated by the Board of Regents provide that a nontenured teacher "dismissed" before the end of the year may have some opportunity for review of the "dismissal." But the Rules provide no real protection for a nontenured teacher who simply is not re-employed for the next year. He must be informed by February 1 "concerning retention or non-retention for the ensuing year." But "no reason for non-retention need be given. No review or appeal is provided in such case." [4]

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on probation. The employment shall be permanent, during efficiency and good behavior after 4 years of continuous service in the state university system as a teacher."

[3] Wis. Stat. § 37.31 (1) further provided that:

"No teacher who has become permanently employed as herein provided shall be discharged except for cause upon written charges. Within 30 days of receiving the written charges, such teacher may appeal the discharge by a written notice to the president of the board of regents of state colleges. The board shall cause the charges to be investigated, hear the case and provide such teacher with a written statement as to their decision."

[4] The Rules, promulgated by the Board of Regents in 1967, provide:

"RULE I—February first is established throughout the State University system as the deadline for written notification of non-tenured

In conformance with these Rules, the President of Wisconsin State University-Oshkosh informed the respondent before February 1, 1969, that he would not be rehired for the 1969–1970 academic year. He gave the respondent no reason for the decision and no opportunity to challenge it at any sort of hearing.

The respondent then brought this action in Federal District Court alleging that the decision not to rehire him for the next year infringed his Fourteenth Amendment rights. He attacked the decision both in substance and procedure. First, he alleged that the true reason for the decision was to punish him for certain statements critical of the University administration, and that it therefore violated his right to freedom of speech.[5]

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faculty concerning retention or non-retention for the ensuing year. The President of each University shall give such notice each year on or before this date."

"RULE II—During the time a faculty member is on probation, no reason for non-retention need be given. No review or appeal is provided in such case.

"RULE III—'Dismissal' as opposed to 'Non-Retention' means termination of responsibilities during an academic year. When a non-tenure faculty member is dismissed he has no right under Wisconsin Statutes to a review of his case or to appeal. The President may, however, in his discretion, grant a request for a review within the institution, either by a faculty committee or by the President, or both. Any such review would be informal in nature and would be advisory only.

"RULE IV—When a non-tenure faculty member is dismissed he may request a review by or hearing before the Board of Regents. Each such request will be considered separately and the Board will, in its discretion, grant or deny same in each individual case."

[5] While the respondent alleged that he was not rehired because of his exercise of free speech, the petitioners insisted that the non-retention decision was based on other, constitutionally valid grounds. The District Court came to no conclusion whatever regarding the true reason for the University President's decision. "In the pres-

Second, he alleged that the failure of University officials to give him notice of any reason for nonretention and an opportunity for a hearing violated his right to procedural due process of law.

The District Court granted summary judgment for the respondent on the procedural issue, ordering the University officials to provide him with reasons and a hearing. 310 F. Supp. 972. The Court of Appeals, with one judge dissenting, affirmed this partial summary judgment. 446 F. 2d 806. We granted certiorari. 404 U. S. 909. The only question presented to us at this stage in the case is whether the respondent had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year.[6] We hold that he did not.

I

The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right

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ent case," it stated, "it appears that a determination as to the actual bases of [the] decision must await amplification of the facts at trial. . . . Summary judgment is inappropriate." 310 F. Supp. 972, 982.

[6] The courts that have had to decide whether a nontenured public employee has a right to a statement of reasons or a hearing upon nonrenewal of his contract have come to varying conclusions. Some have held that neither procedural safeguard is required. *E. g., Orr* v. *Trinter,* 444 F. 2d 128 (CA6); *Jones* v. *Hopper,* 410 F. 2d 1323 (CA10); *Freeman* v. *Gould Special School District,* 405 F. 2d 1153 (CA8). At least one court has held that there is a right to a statement of reasons but not a hearing. *Drown* v. *Portsmouth School District,* 435 F. 2d 1182 (CA1). And another has held that both requirements depend on whether the employee has an "expectancy" of continued employment. *Ferguson* v. *Thomas,* 430 F. 2d 852, 856 (CA5).

to some kind of prior hearing is paramount.[7] But the range of interests protected by procedural due process is not infinite.

The District Court decided that procedural due process guarantees apply in this case by assessing and balancing the weights of the particular interests involved. It concluded that the respondent's interest in re-employment at Wisconsin State University-Oshkosh outweighed the University's interest in denying him re-employment summarily. 310 F. Supp., at 977–979. Undeniably, the respondent's re-employment prospects were of major concern to him—concern that we surely cannot say was insignificant. And a weighing processs has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process.[8] But, to determine whether

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[7] Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie* v. *Connecticut,* 401 U. S. 371, 379. "While '[m]any controversies have raged about . . . the Due Process Clause,' . . . it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate [a protected] interest . . . , it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective." *Bell* v. *Burson,* 402 U. S. 535, 542. For the rare and extraordinary situations in which we have held that deprivation of a protected interest need not be preceded by opportunity for some kind of hearing, see, *e. g., Central Union Trust Co.* v. *Garvan,* 254 U. S. 554, 566; *Phillips* v. *Commissioner,* 283 U. S. 589, 597; *Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U. S. 594.

[8] "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie* v. *Connecticut, supra,* at 378. See, *e. g., Goldberg* v. *Kelly,* 397 U. S. 254, 263; *Hannah* v. *Larche,* 363 U. S. 420. The constitutional requirement

due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake. See *Morrissey* v. *Brewer, ante,* at 481. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

"Liberty" and "property" are broad and majestic terms. They are among the "[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience. . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." *National Ins. Co.* v. *Tidewater Co.,* 337 U. S. 582, 646 (Frankfurter, J., dissenting). For that reason, the Court has fully and finally rejected the wooden distinction between "rights" and "privileges" that once seemed to govern the applicability of procedural due process rights.[9] The Court has also made clear that the property interests protected by

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of opportunity for *some* form of hearing before deprivation of a protected interest, of course, does not depend upon such a narrow balancing process. See n. 7, *supra.*

[9] In a leading case decided many years ago, the Court of Appeals for the District of Columbia Circuit held that public employment in general was a "privilege," not a "right," and that procedural due process guarantees therefore were inapplicable. *Bailey* v. *Richardson,* 86 U. S. App. D. C. 248, 182 F. 2d 46, aff'd by an equally divided Court, 341 U. S. 918. The basis of this holding has been thoroughly undermined in the ensuing years. For, as MR. JUSTICE BLACKMUN wrote for the Court only last year, "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Graham* v. *Richardson,* 403 U. S. 365, 374. See, *e. g., Morrissey* v. *Brewer, ante,* at 482; *Bell* v. *Burson, supra,* at 539; *Goldberg* v. *Kelly, supra,* at 262; *Shapiro* v. *Thompson,* 394 U. S. 618, 627 n. 6; *Pickering* v. *Board of Education,* 391 U. S. 563, 568; *Sherbert* v. *Verner,* 374 U. S. 398, 404.

procedural due process extend well beyond actual ownership of real estate, chattels, or money.[10] By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.[11]

Yet, while the Court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For the words "liberty" and "property" in the Due Process Clause of the Fourteenth Amendment must be given some meaning.

II

"While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska*, 262 U. S. 390, 399. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed. See, *e. g.*, *Bolling* v. *Sharpe*, 347 U. S. 497, 499–500; *Stanley* v. *Illinois*, 405 U. S. 645.

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[10] See, *e. g.*, *Connell* v. *Higginbotham*, 403 U. S. 207, 208; *Bell* v. *Burson*, *supra*; *Goldberg* v. *Kelly*, *supra*.

[11] "Although the Court has not assumed to define 'liberty' [in the Fifth Amendment's Due Process Clause] with any great precision, that term is not confined to mere freedom from bodily restraint." *Bolling* v. *Sharpe*, 347 U. S. 497, 499. See, *e. g.*, *Stanley* v. *Illinois*, 405 U. S. 645.

There might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated. But this is not such a case.

The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin* v. *Constantineau,* 400 U. S. 433, 437. *Wieman* v. *Updegraff,* 344 U. S. 183, 191; *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123; *United States* v. *Lovett,* 328 U. S. 303, 316–317; *Peters* v. *Hobby,* 349 U. S. 331, 352 (DOUGLAS, J., concurring). See *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 898. In such a case, due process would accord an opportunity to refute the charge before University officials.[12] In the present case, however, there is no suggestion whatever that the respondent's "good name, reputation, honor, or integrity" is at stake.

Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would

[12] The purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons.

be a different case. For "[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury . . . ." *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra,* at 185 (Jackson, J., concurring). See *Truax* v. *Raich,* 239 U. S. 33, 41. The Court has held, for example, that a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities "in a manner . . . that contravene[s] . . . Due Process," *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 238, and, specifically, in a manner that denies the right to a full prior hearing. *Willner* v. *Committee on Character,* 373 U. S. 96, 103. See *Cafeteria Workers* v. *McElroy, supra,* at 898. In the present case, however, this principle does not come into play.[13]

To be sure, the respondent has alleged that the nonrenewal of his contract was based on his exercise of his right to freedom of speech. But this allegation is not now before us. The District Court stayed proceedings on this issue, and the respondent has yet to prove that

[13] The District Court made an *assumption* "that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career." 310 F. Supp., at 979. And the Court of Appeals based its affirmance of the summary judgment largely on the premise that "the substantial adverse effect non-retention is likely to have upon the career interests of an individual professor" amounts to a limitation on future employment opportunities sufficient to invoke procedural due process guarantees. 446 F. 2d, at 809. But even assuming, *arguendo,* that such a "substantial adverse effect" under these circumstances would constitute a state-imposed restriction on liberty, the record contains no support for these assumptions. There is no suggestion of how nonretention might affect the respondent's future employment prospects. Mere proof, for example, that his record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of "liberty." Cf. *Schware* v. *Board of Bar Examiners,* 353 U. S. 232.

the decision not to rehire him was, in fact, based on his free speech activities.[14]

Hence, on the record before us, all that clearly appears is that the respondent was not rehired for one year at one university. It stretches the concept too far to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains as free as before to seek another. *Cafeteria Workers* v. *McElroy*, *supra*, at 895–896.

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[14] See n. 5, *supra*. The Court of Appeals, nonetheless, argued that opportunity for a hearing and a statement of reasons were required here "as a *prophylactic* against non-retention decisions improperly motivated by exercise of protected rights." 446 F. 2d, at 810 (emphasis supplied). While the Court of Appeals recognized the lack of a finding that the respondent's nonretention was based on exercise of the right of free speech, it felt that the respondent's interest in liberty was sufficiently implicated here because the decision not to rehire him was made "with a background of controversy and unwelcome expressions of opinion." *Ibid.*

When a State would directly impinge upon interests in free speech or free press, this Court has on occasion held that opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards. Thus, we have required fair notice and opportunity for an adversary hearing before an injunction is issued against the holding of rallies and public meetings. *Carroll* v. *Princess Anne*, 393 U. S. 175. Similarly, we have indicated the necessity of procedural safeguards before a State makes a large-scale seizure of a person's allegedly obscene books, magazines, and so forth. *A Quantity of Books* v. *Kansas*, 378 U. S. 205; *Marcus* v. *Search Warrant*, 367 U. S. 717. See *Freedman* v. *Maryland*, 380 U. S. 51; *Bantam Books* v. *Sullivan*, 372 U. S. 58. See generally Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518.

In the respondent's case, however, the State has not directly impinged upon interests in free speech or free press in any way comparable to a seizure of books or an injunction against meetings. Whatever may be a teacher's rights of free speech, the interest in holding a teaching job at a state university, *simpliciter*, is not itself a free speech interest.

III

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms.

Thus, the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. *Goldberg* v. *Kelly*, 397 U. S. 254.[15] See *Flemming* v. *Nestor*, 363 U. S. 603, 611. Similarly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, *Slochower* v. *Board of Education*, 350 U. S. 551, and college professors and

[15] *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, is a related case. There, the petitioner was a lawyer who had been refused admission to practice before the Board of Tax Appeals. The Board had "published rules for admission of persons entitled to practice before it, by which attorneys at law admitted to courts of the United States and the States, and the District of Columbia, as well as certified public accountants duly qualified under the law of any State or the District, are made eligible. . . . The rules further provide that the Board may in its discretion deny admission to any applicant, or suspend or disbar any person after admission." *Id.*, at 119. The Board denied admission to the petitioner under its discretionary power, without a prior hearing and a statement of the reasons for the denial. Although this Court disposed of the case on other grounds, it stated, in an opinion by Mr. Chief Justice Taft, that the existence of the Board's eligibility rules gave the petitioner an interest and claim to practice before the Board to which procedural due process requirements applied. It said that the Board's discretionary power "must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process." *Id.*, at 123.

staff members dismissed during the terms of their contracts, *Wieman* v. *Updegraff*, 344 U. S. 183, have interests in continued employment that are safeguarded by due process. Only last year, the Court held that this principle "proscribing summary dismissal from public employment without hearing or inquiry required by due process" also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment. *Connell* v. *Higginbotham*, 403 U. S. 207, 208.

Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg* v. *Kelly*, *supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

Just as the welfare recipients' "property" interest in welfare payments was created and defined by statutory terms, so the respondent's "property" interest in employment at Wisconsin State University-Oshkosh was created and defined by the terms of his appointment. Those terms secured his interest in employment up to June 30, 1969. But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent "sufficient cause." Indeed, they made no provision for renewal whatsoever.

Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it.[16] In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

IV

Our analysis of the respondent's constitutional rights in this case in no way indicates a view that an opportunity for a hearing or a statement of reasons for nonretention would, or would not, be appropriate or wise in public

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[16] To be sure, the respondent does suggest that most teachers hired on a year-to-year basis by Wisconsin State University-Oshkosh are, in fact, rehired. But the District Court has not found that there is anything approaching a "common law" of re-employment, see *Perry* v. *Sindermann*, *post*, at 602, so strong as to require University officials to give the respondent a statement of reasons and a hearing on their decision not to rehire him.

colleges and universities.[17] For it is a written Constitution that we apply. Our role is confined to interpretation of that Constitution.

We must conclude that the summary judgment for the respondent should not have been granted, since the respondent has not shown that he was deprived of liberty or property protected by the Fourteenth Amendment. The judgment of the Court of Appeals, accordingly, is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL took no part in the decision of this case.

[For concurring opinion of MR. CHIEF JUSTICE BURGER, see *post*, p. 603.]

[For dissenting opinion of MR. JUSTICE BRENNAN, see *post*, p. 604.]

MR. JUSTICE DOUGLAS, dissenting.

Respondent Roth, like Sindermann in the companion case, had no tenure under Wisconsin law and, unlike Sindermann, he had had only one year of teaching at Wisconsin State University-Oshkosh—where during 1968–1969 he had been Assistant Professor of Political Science and International Studies. Though Roth was rated by the faculty as an excellent teacher, he had publicly criticized the administration for suspending an entire group of 94 black students without determining individual guilt. He also criticized the university's regime as being authoritarian and autocratic. He used his classroom to discuss what was being done about the

[17] See, *e. g.*, Report of Committee A on Academic Freedom and Tenure, Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments, 56 AAUP Bulletin No. 1, p. 21 (Spring 1970).

black episode; and one day, instead of meeting his class, he went to the meeting of the Board of Regents.

In this case, as in *Sindermann*, an action was started in Federal District Court under 42 U. S. C. § 1983 [1] claiming in part that the decision of the school authorities not to rehire was in retaliation for his expression of opinion. The District Court, in partially granting Roth's motion for summary judgment, held that the Fourteenth Amendment required the university to give a hearing to teachers whose contracts were not to be renewed and to give reasons for its action. 310 F. Supp. 972, 983. The Court of Appeals affirmed. 446 F. 2d 806.

Professor Will Herberg, of Drew University, in writing of "academic freedom" recently said:

> "[I]t is sometimes conceived as a basic constitutional right guaranteed and protected under the First Amendment.
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> "But, of course, this is not the case. Whereas a man's right to speak out on this or that may be guaranteed and protected, he can have no imaginable human or constitutional right to remain a member of a university faculty. Clearly, the right to academic freedom is an acquired one, yet an acquired right of such value to society that in the minds of many it has verged upon the constitutional." Washington Sunday Star, Jan. 23, 1972, B–3, col. 1.

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[1] Section 1983 reads as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

There may not be a constitutional right to continued employment if private schools and colleges are involved. But Prof. Herberg's view is not correct when public schools move against faculty members. For the First Amendment, applicable to the States by reason of the Fourteenth Amendment, protects the individual against state action when it comes to freedom of speech and of press and the related freedoms guaranteed by the First Amendment; and the Fourteenth protects "liberty" and "property" as stated by the Court in *Sindermann.*

No more direct assault on academic freedom can be imagined than for the school authorities to be allowed to discharge a teacher because of his or her philosophical, political, or ideological beliefs. The same may well be true of private schools, if through the device of financing or other umbilical cords they become instrumentalities of the State. Mr. Justice Frankfurter stated the constitutional theory in *Sweezy* v. *New Hampshire,* 354 U. S. 234, 261–262 (concurring in result):

> "Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered

> as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling."

We repeated that warning in *Keyishian* v. *Board of Regents*, 385 U. S. 589, 603:

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

When a violation of First Amendment rights is alleged, the reasons for dismissal or for nonrenewal of an employment contract must be examined to see if the reasons given are only a cloak for activity or attitudes protected by the Constitution. A statutory analogy is present under the National Labor Relations Act, 29 U. S. C. § 151 *et seq.* While discharges of employees for "cause" are permissible (*Fibreboard Corp.* v. *NLRB*, 379 U. S. 203, 217), discharges because of an employee's union activities are banned by § 8 (a)(3), 29 U. S. C. § 158 (a)(3). So the search is to ascertain whether the stated ground was the real one or only a pretext. See *J. P. Stevens & Co.* v. *NLRB*, 380 F. 2d 292, 300.

In the case of teachers whose contracts are not renewed, tenure is not the critical issue. In the *Sweezy* case, the teacher, whose First Amendment rights we honored, had no tenure but was only a guest lecturer. In the *Keyishian* case, one of the petitioners (Keyishian himself) had only a "one-year-term contract" that was not renewed. 385 U. S., at 592. In *Shelton* v. *Tucker*, 364 U. S. 479, one of the petitioners was

a teacher whose "contract for the ensuing school year was not renewed" (*id.*, at 483) and two others who refused to comply were advised that it made "impossible their re-employment as teachers for the following school year." *Id.*, at 484. The oath required in *Keyishian* and the affidavit listing memberships required in *Shelton* were both, in our view, in violation of First Amendment rights. Those cases mean that conditioning renewal of a teacher's contract upon surrender of First Amendment rights is beyond the power of a State.

There is sometimes a conflict between a claim for First Amendment protection and the need for orderly administration of the school system, as we noted in *Pickering* v. *Board of Education,* 391 U. S. 563, 569. That is one reason why summary judgments in this class of cases are seldom appropriate. Another reason is that careful factfinding is often necessary to know whether the given reason for nonrenewal of a teacher's contract is the real reason or a feigned one.

It is said that since teaching in a public school is a privilege, the State can grant it or withhold it on conditions. We have, however, rejected that thesis in numerous cases, *e. g., Graham* v. *Richardson,* 403 U. S. 365, 374. See Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968). In *Hannegan* v. *Esquire, Inc.,* 327 U. S. 146, 156, we said that Congress may not by withdrawal of mailing privileges place limitations on freedom of speech which it could not do constitutionally if done directly. We said in *American Communications Assn.* v. *Douds,* 339 U. S. 382, 402, that freedom of speech was abridged when the only restraint on its exercise was withdrawal of the privilege to invoke the facilities of the National Labor Relations Board. In *Wieman* v. *Updegraff,* 344 U. S. 183, we held that an applicant could not be denied the opportunity

for public employment because he had exercised his First Amendment rights. And in *Speiser* v. *Randall*, 357 U. S. 513, we held that a denial of a tax exemption unless one gave up his First Amendment rights was an abridgment of Fourteenth Amendment rights.

As we held in *Speiser* v. *Randall, supra*, when a State proposes to deny a privilege to one who it alleges has engaged in unprotected speech, Due Process requires that the State bear the burden of proving that the speech was not protected. "[T]he 'protection of the individual against arbitrary action' . . . [is] the very essence of due process," *Slochower* v. *Board of Education*, 350 U. S. 551, 559, but where the State is allowed to act secretly behind closed doors and without any notice to those who are affected by its actions, there is no check against the possibility of such "arbitrary action."

Moreover, where "important interests" of the citizen are implicated (*Bell* v. *Burson*, 402 U. S. 535, 539) they are not to be denied or taken away without due process. *Ibid.* *Bell* v. *Burson* involved a driver's license. But also included are disqualification for unemployment compensation (*Sherbert* v. *Verner*, 374 U. S. 398), discharge from public employment (*Slochower* v. *Board of Education, supra*), denial of tax exemption (*Speiser* v. *Randall, supra*), and withdrawal of welfare benefits (*Goldberg* v. *Kelly*, 397 U. S. 254). And see *Wisconsin* v. *Constantineau*, 400 U. S. 433. We should now add that nonrenewal of a teacher's contract, whether or not he has tenure, is an entitlement of the same importance and dignity.

Cafeteria Workers v. *McElroy*, 367 U. S. 886, is not opposed. It held that a cook employed in a cafeteria in a military installation was not entitled to a hearing prior

to the withdrawal of her access to the facility. Her employer was prepared to employ her at another of its restaurants, the withdrawal was not likely to injure her reputation, and her employment opportunities elsewhere were not impaired. The Court held that the very limited individual interest in this one job did not outweigh the Government's authority over an important federal military establishment. Nonrenewal of a teacher's contract is tantamount in effect to a dismissal and the consequences may be enormous. Nonrenewal can be a blemish that turns into a permanent scar and effectively limits any chance the teacher has of being rehired as a teacher, at least in his State.

If this nonrenewal implicated the First Amendment, then Roth was deprived of constitutional rights because his employment was conditioned on a surrender of First Amendment rights; and, apart from the First Amendment, he was denied due process when he received no notice and hearing of the adverse action contemplated against him. Without a statement of the reasons for the discharge and an opportunity to rebut those reasons—both of which were refused by petitioners—there is no means short of a lawsuit to safeguard the right not to be discharged for the exercise of First Amendment guarantees.

The District Court held, 310 F. Supp., at 979–980:

> "Substantive constitutional protection for a university professor against non-retention in violation of his First Amendment rights or arbitrary non-retention is useless without procedural safeguards. I hold that minimal procedural due process includes a statement of the reasons why the university intends not to retain the professor, notice of a hearing at which he may respond to the stated reasons, and a hearing if the professor appears at the appointed

time and place. At such a hearing the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons. The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are wholly inappropriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact."

It was that procedure that the Court of Appeals approved. 446 F. 2d, at 809–810. The Court of Appeals also concluded that though the § 1983 action was pending in court, the court should stay its hand until the academic procedures had been completed.[2] As stated by the Court of Appeals in *Sindermann* v. *Perry*, 430 F. 2d 939 (CA5):

"School-constituted review bodies are the most appropriate forums for initially determining issues of this type, both for the convenience of the parties and in order to bring academic expertise to bear in resolving the nice issues of administrative discipline, teacher competence and school policy, which so frequently must be balanced in reaching a proper determination." *Id.*, at 944–945.

That is a permissible course for district courts to take, though it does not relieve them of the final determination

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[2] Such a procedure would not be contrary to the well-settled rule that § 1983 actions do not require exhaustion of other remedies. See, *e. g.*, *Wilwording* v. *Swenson*, 404 U. S. 249 (1971); *Damico* v. *California*, 389 U. S. 416 (1967); *McNeese* v. *Board of Education*, 373 U. S. 668 (1963); *Monroe* v. *Pape*, 365 U. S. 167 (1961). One of the allegations in the complaint was that respondent was denied any effective state remedy, and the District Court's staying its hand thus furthered rather than thwarted the purposes of § 1983.

whether nonrenewal of the teacher's contract was in retaliation for the exercise of First Amendment rights or a denial of due process.

Accordingly I would affirm the judgment of the Court of Appeals.

MR. JUSTICE MARSHALL, dissenting.

Respondent was hired as an assistant professor of political science at Wisconsin State University-Oshkosh for the 1968–1969 academic year. During the course of that year he was told that he would not be rehired for the next academic term, but he was never told why. In this case, he asserts that the Due Process Clause of the Fourteenth Amendment to the United States Constitution entitled him to a statement of reasons and a hearing on the University's decision not to rehire him for another year.[1] This claim was sustained by the District Court, which granted respondent summary judgment, 310 F. Supp. 972, and by the Court of Appeals which affirmed the judgment of the District Court. 446 F. 2d 806. This Court today reverses the judgment of the Court of Appeals and rejects respondent's claim. I dissent.

While I agree with Part I of the Court's opinion, setting forth the proper framework for consideration of the issue presented, and also with those portions of Parts II and III of the Court's opinion that assert that a public employee is entitled to procedural due process whenever a State stigmatizes him by denying employment, or injures his future employment prospects severely, or whenever the State deprives him of a prop-

[1] Respondent has also alleged that the true reason for the decision not to rehire him was to punish him for certain statements critical of the University. As the Court points out, this issue is not before us at the present time.

erty interest, I would go further than the Court does in defining the terms "liberty" and "property."

The prior decisions of this Court, discussed at length in the opinion of the Court, establish a principle that is as obvious as it is compelling—*i. e.*, federal and state governments and governmental agencies are restrained by the Constitution from acting arbitrarily with respect to employment opportunities that they either offer or control. Hence, it is now firmly established that whether or not a private employer is free to act capriciously or unreasonably with respect to employment practices, at least absent statutory [2] or contractual [3] controls, a government employer is different. The government may only act fairly and reasonably.

This Court has long maintained that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax* v. *Raich*, 239 U. S. 33, 41 (1915) (Hughes, J.). See also *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923). It has also established that the fact that an employee has no contract guaranteeing work for a specific future period does not mean that as the result of action by the government he may be "discharged at any time for any reason or for no reason." *Truax* v. *Raich*, *supra*, at 38.

In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment. This is the "property" right that I believe is protected by the Fourteenth Amendment and that cannot be denied "without due process of law." And it is also liberty—

[2] See, *e. g.*, *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971); 42 U. S. C. § 2000e.

[3] Cf. Note, Procedural "Due Process" in Union Disciplinary Proceedings, 57 Yale L. J. 1302 (1948).

liberty to work—which is the "very essence of the personal freedom and opportunity" secured by the Fourteenth Amendment.

This Court has often had occasion to note that the denial of public employment is a serious blow to any citizen. See, *e. g., Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 185 (1951) (Jackson, J., concurring); *United States* v. *Lovett,* 328 U. S. 303, 316–317 (1946). Thus, when an application for public employment is denied or the contract of a government employee is not renewed, the government must say why, for it is only when the reasons underlying government action are known that citizens feel secure and protected against arbitrary government action.

Employment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life. When something as valuable as the opportunity to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable. And it is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action.

MR. JUSTICE DOUGLAS has written that:

> "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra,* at 179 (concurring opinion).

And Mr. Justice Frankfurter has said that "[t]he history of American freedom is, in no small measure, the

history of procedure." *Malinski* v. *New York*, 324 U. S. 401, 414 (1945) (separate opinion). With respect to occupations controlled by the government, one lower court has said that "[t]he public has the right to expect its officers . . . to make adjudications on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse." *Hornsby* v. *Allen*, 326 F. 2d 605, 610 (CA5 1964).

We have often noted that procedural due process means many different things in the numerous contexts in which it applies. See, *e. g.*, *Goldberg* v. *Kelly*, 397 U. S. 254 (1970); *Bell* v. *Burson*, 402 U. S. 535 (1971). Prior decisions have held that an applicant for admission to practice as an attorney before the United States Board of Tax Appeals may not be rejected without a statement of reasons and a chance for a hearing on disputed issues of fact; [4] that a tenured teacher could not be summarily dismissed without notice of the reasons and a hearing; [5] that an applicant for admission to a state bar could not be denied the opportunity to practice law without notice of the reasons for the rejection of his application and a hearing; [6] and even that a substitute teacher who had been employed only two months could not be dismissed merely because she refused to take a loyalty oath without an inquiry into the specific facts of her case and a hearing on those in dispute.[7] I would follow these cases and hold that respondent was denied due process when his contract was not renewed and he was not informed of the reasons and given an opportunity to respond.

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[4] *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117 (1926).

[5] *Slochower* v. *Board of Education*, 350 U. S. 551 (1956).

[6] *Willner* v. *Committee on Character*, 373 U. S. 96 (1963).

[7] *Connell* v. *Higginbotham*, 403 U. S. 207 (1971).

It may be argued that to provide procedural due process to all public employees or prospective employees would place an intolerable burden on the machinery of government. Cf. *Goldberg* v. *Kelly, supra.* The short answer to that argument is that it is not burdensome to give reasons when reasons exist. Whenever an application for employment is denied, an employee is discharged, or a decision not to rehire an employee is made, there should be some reason for the decision. It can scarcely be argued that government would be crippled by a requirement that the reason be communicated to the person most directly affected by the government's action.

Where there are numerous applicants for jobs, it is likely that few will choose to demand reasons for not being hired. But, if the demand for reasons is exceptionally great, summary procedures can be devised that would provide fair and adequate information to all persons. As long as the government has a good reason for its actions it need not fear disclosure. It is only where the government acts improperly that procedural due process is truly burdensome. And that is precisely when it is most necessary.

It might also be argued that to require a hearing and a statement of reasons is to require a useless act, because a government bent on denying employment to one or more persons will do so regardless of the procedural hurdles that are placed in its path. Perhaps this is so, but a requirement of procedural regularity at least renders arbitrary action more difficult. Moreover, proper procedures will surely eliminate some of the arbitrariness that results, not from malice, but from innocent error. "Experience teaches . . . that the affording of procedural safeguards, which by their nature serve to illuminate the underlying facts, in itself often operates to prevent erroneous decisions on the merits

from occurring." *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 366 (1963). When the government knows it may have to justify its decisions with sound reasons, its conduct is likely to be more cautious, careful, and correct.

Professor Gellhorn put the argument well:

> "In my judgment, there is no basic division of interest between the citizenry on the one hand and officialdom on the other. Both should be interested equally in the quest for procedural safeguards. I echo the late Justice JACKSON in saying: 'Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice'—blunders which are likely to occur when reasons need not be given and when the reasonableness and indeed legality of judgments need not be subjected to any appraisal other than one's own. . . ." Summary of Colloquy on Administrative Law, 6 J. Soc. Pub. Teachers of Law 70, 73 (1961).

Accordingly, I dissent.

Syllabus

PERRY ET AL. *v.* SINDERMANN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 70–36. Argued January 18, 1972—Decided June 29, 1972

Respondent was employed in a state college system for 10 years, the last four as a junior college professor under a series of one-year written contracts. The Regents declined to renew his employment for the next year, without giving him an explanation or prior hearing. Respondent then brought this action in the District Court, alleging that the decision not to rehire him was based on respondent's public criticism of the college administration and thus infringed his free speech right, and that the Regents' failure to afford him a hearing violated his procedural due process right. The District Court granted summary judgment for petitioners, concluding that respondent's contract had terminated and the junior college had not adopted the tenure system. The Court of Appeals reversed on the grounds that, despite lack of tenure, nonrenewal of respondent's contract would violate the Fourteenth Amendment if it was in fact based on his protected free speech, and that if respondent could show that he had an "expectancy" of re-employment, the failure to allow him an opportunity for a hearing would violate the procedural due process guarantee. *Held:*

1. Lack of a contractual or tenure right to re-employment, taken alone, did not defeat respondent's claim that the nonrenewal of his contract violated his free speech right under the First and Fourteenth Amendments. The District Court therefore erred in foreclosing determination of the contested issue whether the decision not to renew was based on respondent's exercise of his right of free speech. Pp. 596–598.

2. Though a subjective "expectancy" of tenure is not protected by procedural due process, respondent's allegation that the college had a *de facto* tenure policy, arising from rules and understandings officially promulgated and fostered, entitled him to an opportunity of proving the legitimacy of his claim to job tenure. Such proof would obligate the college to afford him a requested hearing where he could be informed of the grounds for his nonretention and challenge their sufficiency. Pp. 599–603.

430 F. 2d 939, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 603. BRENNAN, J., filed an opinion dissenting in part, in which DOUGLAS, J., joined, *post*, p. 604. MARSHALL, J., filed an opinion dissenting in part, *post*, p. 605. POWELL, J., took no part in the decision of the case.

W. O. Shafer argued the cause for petitioners. With him on the brief was *Lucius D. Bunton.*

Michael H. Gottesman argued the cause for respondent. With him on the brief were *George H. Cohen* and *Warren Burnett.*

Briefs of *amici curiae* urging affirmance were filed by *David Rubin* and *Richard J. Medalie* for the National Education Association; by *John Ligtenberg* and *Andrew J. Leahy* for the American Federation of Teachers; and by *Herman I. Orentlicher* and *William W. Van Alstyne* for the American Association of University Professors.

MR. JUSTICE STEWART delivered the opinion of the Court.

From 1959 to 1969 the respondent, Robert Sindermann, was a teacher in the state college system of the State of Texas. After teaching for two years at the University of Texas and for four years at San Antonio Junior College, he became a professor of Government and Social Science at Odessa Junior College in 1965. He was employed at the college for four successive years, under a series of one-year contracts. He was successful enough to be appointed, for a time, the cochairman of his department.

During the 1968–1969 academic year, however, controversy arose between the respondent and the college administration. The respondent was elected president of the Texas Junior College Teachers Association. In this capacity, he left his teaching duties on several occasions to testify before committees of the Texas Legis-

lature, and he became involved in public disagreements with the policies of the college's Board of Regents. In particular, he aligned himself with a group advocating the elevation of the college to four-year status—a change opposed by the Regents. And, on one occasion, a newspaper advertisement appeared over his name that was highly critical of the Regents.

Finally, in May 1969, the respondent's one-year employment contract terminated and the Board of Regents voted not to offer him a new contract for the next academic year. The Regents issued a press release setting forth allegations of the respondent's insubordination.[1] But they provided him no official statement of the reasons for the nonrenewal of his contract. And they allowed him no opportunity for a hearing to challenge the basis of the nonrenewal.

The respondent then brought this action in Federal District Court. He alleged primarily that the Regents' decision not to rehire him was based on his public criticism of the policies of the college administration and thus infringed his right to freedom of speech. He also alleged that their failure to provide him an opportunity for a hearing violated the Fourteenth Amendment's guarantee of procedural due process. The petitioners—members of the Board of Regents and the president of the college—denied that their decision was made in retaliation for the respondent's public criticism and argued that they had no obligation to provide a hearing.[2] On the basis of these bare pleadings and three

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[1] The press release stated, for example, that the respondent had defied his superiors by attending legislative committee meetings when college officials had specifically refused to permit him to leave his classes for that purpose.

[2] The petitioners claimed, in their motion for summary judgment, that the decision not to retain the respondent was really based on his insubordinate conduct. See n. 1, *supra*.

brief affidavits filed by the respondent,[3] the District Court granted summary judgment for the petitioners. It concluded that the respondent had "no cause of action against the [petitioners] since his contract of employment terminated May 31, 1969, and Odessa Junior College has not adopted the tenure system."[4]

The Court of Appeals reversed the judgment of the District Court. 430 F. 2d 939. First, it held that, despite the respondent's lack of tenure, the nonrenewal of his contract would violate the Fourteenth Amendment if it in fact was based on his protected free speech. Since the actual reason for the Regents' decision was "in total dispute" in the pleadings, the court remanded the case for a full hearing on this contested issue of fact. *Id.*, at 942–943. Second, the Court of Appeals held that, despite the respondent's lack of tenure, the failure to allow him an opportunity for a hearing would violate the constitutional guarantee of procedural due process if the respondent could show that he had an "expectancy" of re-employment. It, therefore, ordered that this issue of fact also be aired upon remand. *Id.*, at 943–944. We granted a writ of certiorari, 403 U. S. 917, and we have considered this case along with *Board of Regents* v. *Roth, ante,* p. 564.

I

The first question presented is whether the respondent's lack of a contractual or tenure right to re-employment, taken alone, defeats his claim that the nonrenewal of his contract violated the First and Fourteenth Amendments. We hold that it does not.

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[3] The petitioners, for whom summary judgment was granted, submitted no affidavits whatever. The respondent's affidavits were very short and essentially repeated the general allegations of his complaint.

[4] The findings and conclusions of the District Court—only several lines long—are not officially reported.

For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser* v. *Randall*, 357 U. S. 513, 526. Such interference with constitutional rights is impermissible.

We have applied this general principle to denials of tax exemptions, *Speiser* v. *Randall, supra,* unemployment benefits, *Sherbert* v. *Verner*, 374 U. S. 398, 404–405, and welfare payments, *Shapiro* v. *Thompson*, 394 U. S. 618, 627 n. 6; *Graham* v. *Richardson*, 403 U. S. 365, 374. But, most often, we have applied the principle to denials of public employment. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100; *Wieman* v. *Updegraff*, 344 U. S. 183, 192; *Shelton* v. *Tucker*, 364 U. S. 479, 485–486; *Torcaso* v. *Watkins*, 367 U. S. 488, 495–496; *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 894; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 288; *Baggett* v. *Bullitt*, 377 U. S. 360; *Elfbrandt* v. *Russell*, 384 U. S. 11, 17; *Keyishian* v. *Board of Regents*, 385 U. S. 589, 605–606; *Whitehill* v. *Elkins*, 389 U. S. 54; *United States* v. *Robel*, 389 U. S. 258; *Pickering* v. *Board of Education*, 391 U. S. 563, 568. We have applied the principle regardless of the public employee's contractual or other claim to a job. Compare *Pickering* v. *Board of Education, supra,* with *Shelton* v. *Tucker, supra.*

Thus, the respondent's lack of a contractual or tenure

"right" to re-employment for the 1969–1970 academic year is immaterial to his free speech claim. Indeed, twice before, this Court has specifically held that the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights. *Shelton* v. *Tucker, supra; Keyishian* v. *Board of Regents, supra.* We reaffirm those holdings here.

In this case, of course, the respondent has yet to show that the decision not to renew his contract was, in fact, made in retaliation for his exercise of the constitutional right of free speech. The District Court foreclosed any opportunity to make this showing when it granted summary judgment. Hence, we cannot now hold that the Board of Regents' action was invalid.

But we agree with the Court of Appeals that there is a genuine dispute as to "whether the college refused to renew the teaching contract on an impermissible basis—as a reprisal for the exercise of constitutionally protected rights." 430 F. 2d, at 943. The respondent has alleged that his nonretention was based on his testimony before legislative committees and his other public statements critical of the Regents' policies. And he has alleged that this public criticism was within the First and Fourteenth Amendments' protection of freedom of speech. Plainly, these allegations present a bona fide constitutional claim. For this Court has held that a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment. *Pickering* v. *Board of Education, supra.*

For this reason we hold that the grant of summary judgment against the respondent, without full exploration of this issue, was improper.

II

The respondent's lack of formal contractual or tenure security in continued employment at Odessa Junior College, though irrelevant to his free speech claim, is highly relevant to his procedural due process claim. But it may not be entirely dispositive.

We have held today in *Board of Regents* v. *Roth, ante,* p. 564, that the Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract, unless he can show that the decision not to rehire him somehow deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, despite the lack of tenure or a formal contract. In *Roth* the teacher had not made a showing on either point to justify summary judgment in his favor.

Similarly, the respondent here has yet to show that he has been deprived of an interest that could invoke procedural due process protection. As in *Roth,* the mere showing that he was not rehired in one particular job, without more, did not amount to a showing of a loss of liberty.[5] Nor did it amount to a showing of a loss of property.

But the respondent's allegations—which we must construe most favorably to the respondent at this stage of the litigation—do raise a genuine issue as to his interest in continued employment at Odessa Junior College. He alleged that this interest, though not secured by a formal contractual tenure provision, was secured by a no less binding understanding fostered by the college administra-

[5] The Court of Appeals suggested that the respondent might have a due process right to some kind of hearing simply if he *asserts* to college officials that their decision was based on his constitutionally protected conduct. 430 F. 2d, at 944. We have rejected this approach in *Board of Regents* v. *Roth, ante,* at 575 n. 14.

tion. In particular, the respondent alleged that the college had a *de facto* tenure program, and that he had tenure under that program. He claimed that he and others legitimately relied upon an unusual provision that had been in the college's official Faculty Guide for many years:

> "*Teacher Tenure:* Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work."

Moreover, the respondent claimed legitimate reliance upon guidelines promulgated by the Coordinating Board of the Texas College and University System that provided that a person, like himself, who had been employed as a teacher in the state college and university system for seven years or more has some form of job tenure.[6]

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[6] The relevant portion of the guidelines, adopted as "Policy Paper 1" by the Coordinating Board on October 16, 1967, reads:

"A. Tenure

"Tenure means assurance to an experienced faculty member that he may expect to continue in his academic position unless adequate cause for dismissal is demonstrated in a fair hearing, following established procedures of due process.

"A specific system of faculty tenure undergirds the integrity of each academic institution. In the Texas public colleges and universities, this tenure system should have these components:

"(1) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period for a faculty member shall not exceed seven years, including within this period appropriate full-time service in all institutions of higher education. This is subject to the provision that when, after a term of probationary service of more than three years in one or more institutions, a faculty member is employed by another institution, it may be agreed in writing that his new appointment is for a probationary period

Thus, the respondent offered to prove that a teacher with his long period of service at this particular State College had no less a "property" interest in continued employment than a formally tenured teacher at other colleges, and had no less a procedural due process right to a statement of reasons and a hearing before college officials upon their decision not to retain him.

We have made clear in *Roth, supra,* at 571–572, that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." *Id.,* at 577. A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. *Ibid.*

A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient "cause" is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a "property" interest in re-employment. For example, the law of contracts in most, if not all, jurisdictions long has employed

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of not more than four years (even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years).

. . . . . .

"(3) Adequate cause for dismissal for a faculty member with tenure may be established by demonstrating professional incompetence, moral turpitude, or gross neglect of professional responsibilities."

The respondent alleges that, because he has been employed as a "full-time instructor" or professor within the Texas College and University System for 10 years, he should have "tenure" under these provisions.

a process by which agreements, though not formalized in writing, may be "implied." 3 A. Corbin on Contracts §§ 561–572A (1960). Explicit contractual provisions may be supplemented by other agreements implied from "the promisor's words and conduct in the light of the surrounding circumstances." *Id.*, at § 562. And, "[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past." *Ibid.*

A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a "common law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement, *Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, 579, so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university, like Odessa Junior College, that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice. See C. Byse & L. Joughin, Tenure in American Higher Education 17–28 (1959).[7]

In this case, the respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent "suf-

[7] We do not now hold that the respondent has any such legitimate claim of entitlement to job tenure. For "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents* v. *Roth*, *supra*, at 577. If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated.

ficient cause." We disagree with the Court of Appeals insofar as it held that a mere subjective "expectancy" is protected by procedural due process, but we agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of "the policies and practices of the institution." 430 F. 2d, at 943. Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency.

Therefore, while we do not wholly agree with the opinion of the Court of Appeals, its judgment remanding this case to the District Court is

Affirmed.

MR. JUSTICE POWELL took no part in the decision of this case.

MR. CHIEF JUSTICE BURGER, concurring.*

I concur in the Court's judgments and opinions in *Sindermann* and *Roth*, but there is one central point in both decisions that I would like to underscore since it may have been obscured in the comprehensive discussion of the cases. That point is that the relationship between a state institution and one of its teachers is essentially a matter of state concern and state law. The Court holds today only that a state-employed teacher who has a right to re-employment under state law, arising from either an express or implied contract, has, in turn, a right guaranteed by the Fourteenth Amendment to some form of prior administrative or academic hearing on the cause

*This opinion applies also to No. 71-162, *Board of Regents of State Colleges et al.* v. *Roth*, *ante*, p. 564.

for nonrenewal of his contract. Thus, whether a particular teacher in a particular context has any right to such administrative hearing hinges on a question of state law. The Court's opinion makes this point very sharply:

> "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents* v. *Roth, ante,* at 577.

Because the availability of the Fourteenth Amendment right to a prior administrative hearing turns in each case on a question of state law, the issue of abstention will arise in future cases contesting whether a particular teacher is entitled to a hearing prior to nonrenewal of his contract. If relevant state contract law is unclear, a federal court should, in my view, abstain from deciding whether he is constitutionally entitled to a prior hearing, and the teacher should be left to resort to state courts on the questions arising under state law.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS joins, dissenting in No. 71–162, *ante,* p. 564, and dissenting in part in No. 70–36.

Although I agree with Part I of the Court's opinion in No. 70–36, I also agree with my Brother MARSHALL that "respondent[s] [were] denied due process when [their] contract[s] [were] not renewed and [they were] not informed of the reasons and given an opportunity to respond." *Ante,* at 590. Since respondents were entitled to summary judgment on that issue, I would affirm the judgment of the Court of Appeals in No. 71–162, and, to the extent indicated by my Brother MARSHALL, I would modify the judgment of the Court of Appeals in No. 70–36.

MR. JUSTICE MARSHALL, dissenting in part.

Respondent was a teacher in the state college system of the State of Texas for a decade before the Board of Regents of Odessa Junior College decided not to renew his contract. He brought this suit in Federal District Court claiming that the decision not to rehire him was in retaliation for his public criticism of the policies of the college administration in violation of the First Amendment, and that because the decision was made without giving him a statement of reasons and a hearing, it denied him the due process of law guaranteed by the Fourteenth Amendment. The District Court granted summary judgment for petitioners, but the Court of Appeals reversed and remanded the case for further proceedings. This Court affirms the judgment of the Court of Appeals.

I agree with Part I of the Court's opinion holding that respondent has presented a bona fide First Amendment claim that should be considered fully by the District Court. But, for the reasons stated in my dissenting opinion in *Board of Regents* v. *Roth*, No. 71–162, *ante*, p. 587, I would modify the judgment of the Court of Appeals to direct the District Court to enter summary judgment for respondent entitling him to a statement of reasons why his contract was not renewed and a hearing on disputed issues of fact.

GRAVEL *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 71–1017. Argued April 19–20, 1972—Decided June 29, 1972*

A United States Senator read to a subcommittee from classified documents (the Pentagon Papers), which he then placed in the public record. The press reported that the Senator had arranged for private publication of the Papers. A grand jury investigating whether violations of federal law were implicated subpoenaed an aide to the Senator. The Senator, as an intervenor, moved to quash the subpoena, contending that it would violate the Speech or Debate Clause to compel the aide to testify. The District Court denied the motion but limited the questioning of the aide. The Court of Appeals affirmed the denial but modified the protective order, ruling that congressional aides and other persons may not be questioned regarding legislative acts and that, though the private publication was not constitutionally protected, a common-law privilege similar to the privilege of protecting executive officials from liability for libel, see *Barr* v. *Matteo*, 360 U. S. 564, barred questioning the aide concerning such publication. *Held:*

1. The Speech or Debate Clause applies not only to a Member of Congress but also to his aide, insofar as the aide's conduct would be a protected legislative act if performed by the Member himself. *Kilbourn* v. *Thompson*, 103 U. S. 168; *Dombrowski* v. *Eastland*, 387 U. S. 82; and *Powell* v. *McCormack*, 395 U. S. 486, distinguished. Pp. 613–622.

2. The Speech or Debate Clause does not extend immunity to the Senator's aide from testifying before the grand jury about the alleged arrangement for private publication of the Pentagon Papers, as such publication had no connection with the legislative process. Pp. 622–627.

3. The aide, similarly, had no nonconstitutional testimonial privilege from being questioned by the grand jury in connection with its inquiry into whether private publication of the Papers violated federal law. P. 627.

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*Together with No. 71–1026, *United States* v. *Gravel*, also on certiorari to the same court.

4. The Court of Appeals' protective order was overly broad in enjoining interrogation of the aide with respect to any act, "in the broadest sense," that he performed within the scope of his employment, since the aide's immunity extended only to legislative acts as to which the Senator would be immune. And the aide may be questioned by the grand jury about the source of classified documents in the Senator's possession, as long as the questioning implicates no legislative act. The order in other respects would suffice if it forbade questioning the aide or others about the conduct or motives of the Senator or his aides at the subcommittee meeting; communications between the Senator and his aides relating to that meeting or any legislative act of the Senator; or steps of the Senator or his aides preparatory for the meeting, if not relevant to third-party crimes. Pp. 627–629.

455 F. 2d 753, vacated and remanded.

WHITE, J., wrote the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed an opinion dissenting in part, *post*, p. 629. DOUGLAS, J., filed a dissenting opinion, *post*, p. 633. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 648.

Robert J. Reinstein and *Charles L. Fishman* argued the cause for petitioner in No. 71–1017 and for respondent in No. 71–1026. With them on the briefs were *Harvey A. Silverglate* and *Alan M. Dershowitz.*

Solicitor General Griswold argued the cause for the United States in both cases. With him on the briefs were *Assistant Attorney General Mardian, Jerome M. Feit, Allan A. Tuttle,* and *Robert L. Keuch.*

Sam J. Ervin, Jr., and *William B. Saxbe* argued the cause for the Senate of the United States as *amicus curiae.* With them on the brief were *James O. Eastland, John O. Pastore, Herman E. Talmadge, Norris Cotton, Peter H. Dominick, Charles McC. Mathias, Jr., Philip B. Kurland,* and *Edward I. Rothschild.*

Briefs of *amici curiae* were filed by *Melvin L. Wulf* and *Sanford Jay Rosen* for the American Civil Liberties

Union; by *Frank B. Frederick* and *Henry Paul Monaghan* for the Unitarian Universalist Association; and by *Morton Stavis* and *Doris Peterson* for Leonard S. Rodberg.

Opinion of the Court by MR. JUSTICE WHITE, announced by MR. JUSTICE BLACKMUN.

These cases arise out of the investigation by a federal grand jury into possible criminal conduct with respect to the release and publication of a classified Defense Department study entitled History of the United States Decision-Making Process on Viet Nam Policy. This document, popularly known as the Pentagon Papers, bore a Defense security classification of Top Secret-Sensitive. The crimes being investigated included the retention of public property or records with intent to convert (18 U. S. C. § 641), the gathering and transmitting of national defense information (18 U. S. C. § 793), the concealment or removal of public records or documents (18 U. S. C. § 2071), and conspiracy to commit such offenses and to defraud the United States (18 U. S. C. § 371).

Among the witnesses subpoenaed were Leonard S. Rodberg, an assistant to Senator Mike Gravel of Alaska and a resident fellow at the Institute of Policy Studies, and Howard Webber, Director of M. I. T. Press. Senator Gravel, as intervenor,[1] filed motions to quash the

[1] The District Court permitted Senator Gravel to intervene in the proceeding on Dr. Rodberg's motion to quash the subpoena ordering his appearance before the grand jury and accepted motions from Gravel to quash the subpoena and to specify the exact nature of the questions to be asked Rodberg. The Government contested Gravel's standing to appeal the trial court's disposition of these motions on the ground that, had the subpoena been directed to the Senator, he could not have appealed from a denial of a motion to quash without first refusing to comply with the subpoena and being held in contempt. *United States* v. *Ryan*, 402 U. S. 530 (1971); *Cobbledick* v. *United States*, 309 U. S. 323 (1940). The Court of

subpoenas and to require the Government to specify the particular questions to be addressed to Rodberg.[2] He asserted that requiring these witnesses to appear and testify would violate his privilege under the Speech or Debate Clause of the United States Constitution, Art. I, § 6, cl. 1.

It appeared that on the night of June 29, 1971, Senator Gravel, as Chairman of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee, convened a meeting of the subcommittee and there read extensively from a copy of the Pentagon Papers. He then placed the entire 47 volumes of the study in the public record. Rodberg had been added to the Senator's staff earlier in the day and assisted Gravel in preparing for and conducting the hearing.[3] Some weeks later there were press reports that Gravel had arranged for the papers to be published by Beacon

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Appeals, *United States* v. *Doe*, 455 F. 2d 753, 756–757 (CA1 1972), held that because the subpoena was directed to third parties, who could not be counted on to risk contempt to protect intervenor's rights, Gravel might be "powerless to avert the mischief of the order" if not permitted to appeal, citing *Perlman* v. *United States*, 247 U. S. 7, 13 (1918). The United States does not here challenge the propriety of the appeal.

[2] Dr. Rodberg, who filed his own motion to quash the subpoena directing his appearance and testimony, appeared as *amicus curiae* both in the Court of Appeals and this Court. Technically, Rodberg states, he is a party to No. 71–1026, insofar as the Government appeals from the protective order entered by the District Court. However, since Gravel intervened, Rodberg does not press the point. Brief of Leonard S. Rodberg as *Amicus Curiae* 2 n. 2.

[3] The District Court found "that 'as personal assistant to movant [Gravel], Dr. Rodberg assisted movant in preparing for disclosure and subsequently disclosing to movant's colleagues and constituents, at a hearing of the Senate Subcommittee on Public Buildings and Grounds, the contents of the so-called "Pentagon Papers," which were critical of the Executive's conduct in the field of foreign relations.'" *United States* v. *Doe*, 332 F. Supp. 930, 932 (Mass. 1971).

Press [4] and that members of Gravel's staff had talked with Webber as editor of M. I. T. Press.[5]

The District Court overruled the motions to quash and to specify questions but entered an order proscribing certain categories of questions. *United States* v. *Doe*, 332 F. Supp. 930 (Mass. 1971). The Government's contention that for purposes of applying the Speech or Debate Clause the courts were free to inquire into the regularity of the subcommittee meeting was rejected.[6] Because the Clause protected all legislative

[4] Beacon Press is a division of the Unitarian Universalist Association, which appeared here as *amicus curiae* in support of the position taken by Senator Gravel.

[5] Gravel so alleged in his motion to intervene in the Webber matter and to quash the subpoena ordering Webber to appear and testify. App. 15–18.

[6] The Government maintained that Congress does not enjoy unlimited power to conduct business and that judicial review has often been exercised to curb extra-legislative incursions by legislative committees, citing *Watkins* v. *United States*, 354 U. S. 178 (1957); *McGrain* v. *Daugherty*, 273 U. S. 135 (1927); *Hentoff* v. *Ichord*, 318 F. Supp. 1175 (DC 1970), at least where such incursions are unrelated to a legitimate legislative purpose. It was alleged that Gravel had "convened a special, unauthorized, and untimely meeting of the Senate Subcommittee on Public Works (at midnight on June 29, 1971), for the purpose of reading the documents and thereafter placed all unread portions in the subcommittee record, with Dr. Rodberg soliciting publication following the meeting." App. 9. The District Court rejected the contention: "Senator Gravel has suggested that the availability of funds for the construction and improvement of public buildings and grounds has been affected by the necessary costs of the war in Vietnam and that therefore the development and conduct of the war is properly within the concern of his subcommittee. The court rejects the Government's argument without detailed consideration of the merits of the Senator's position, on the basis of the general rule restricting judicial inquiry into matters of legislative purpose and operations." *United States* v. *Doe*, 332 F. Supp., at 935. Cases such as *Watkins*, *supra*, were distinguished on the ground that they concerned the power of Congress under the Constitution: "It has not been suggested

acts, it was held to shield from inquiry anything the Senator did at the subcommittee meeting and "certain acts done in preparation therefor." *Id.*, at 935. The Senator's privilege also prohibited "inquiry into things done by Dr. Rodberg as the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally." *Id.*, at 937–938.[7] The trial court, however, held the private publication of the documents was not privileged by the Speech or Debate Clause. *Id.*, at 936.[8]

The Court of Appeals affirmed the denial of the motions to quash but modified the protective order to reflect its own views of the scope of the congressional privilege. *United States* v. *Doe*, 455 F. 2d 753 (CA1 1972). Agreeing that Senator and aide were one for

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by the Government that the Subcommittee itself is unauthorized, nor that the war in Vietnam is an issue beyond the purview of congressional debate and action. Also, the individual rights at stake in these proceedings are not those of a witness before a congressional committee or of a subject of a committee's investigation, but only those of a congressman and member of his personal staff who claim 'intimidation by the executive.'" 332 F. Supp., at 936.

[7] The District Court thought that Rodberg could be questioned concerning his own conduct prior to joining the Senator's staff and concerning the activities of third parties with whom Rodberg and Gravel dealt. *Id.*, at 934.

[8] The protective order entered by the District Court provided as follows:

"(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971 nor about things done by the Senator in preparation for and intimately related to said meeting.

"(2) Dr. Leonard S. Rodberg may not be questioned about his own actions on June 29, 1971 after having been engaged as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for and intimately related to said meeting." *Id.*, at 938.

the purposes of the Speech or Debate Clause and that the Clause foreclosed inquiry of both Senator and aide with respect to legislative acts, the Court of Appeals also viewed the privilege as barring direct inquiry of the Senator or his aide, but not of third parties, as to the sources of the Senator's information used in performing legislative duties.[9] Although it did not consider private publication by the Senator or Beacon Press to be protected by the Constitution, the Court of Appeals apparently held that neither Senator nor aide could be questioned about it because of a common-law privilege akin to the judicially created immunity of executive officers from liability for libel contained in a news release issued in the course of their normal duties. See *Barr* v. *Matteo,* 360 U. S. 564 (1959). This privilege, fashioned by the Court of Appeals, would not protect third parties from similar inquiries before the grand jury. As modified by the Court of Appeals, the protective order to be observed by prosecution and grand jury was:

> "(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor, if the questions are directed to the motives or purposes behind the Senator's conduct at that meeting, about any communications with him or with

[9] The Court of Appeals thought third parties could be questioned as to their own conduct regarding the Pentagon Papers, "including their dealing with intervenor or his aides." *United States* v. *Doe,* 455 F. 2d, at 761. The court found no merit in the claim that such parties should be shielded from questioning under the Speech or Debate Clause concerning their own wrongful acts, even if such questioning may bring the Senator's conduct into question. *Id.,* at 758 n. 2.

his aides regarding the activities of the Senator or his aides during the period of their employment, in preparation for and related to said meeting.

"(2) Dr. Leonard S. Rodberg may not be questioned about his own actions in the broadest sense, including observations and communications, oral or written, by or to him or coming to his attention while being interviewed for, or after having been engaged as a member of Senator Gravel's personal staff to the extent that they were in the course of his employment."

The United States petitioned for certiorari challenging the ruling that aides and other persons may not be questioned with respect to legislative acts and that an aide to a Member of Congress has a common-law privilege not to testify before a grand jury with respect to private publication of materials introduced into a subcommittee record. Senator Gravel also petitioned for certiorari seeking reversal of the Court of Appeals insofar as it held private publication unprotected by the Speech or Debate Clause and asserting that the protective order of the Court of Appeals too narrowly protected against inquiries that a grand jury could direct to third parties. We granted both petitions. 405 U. S. 916 (1972).

I

Because the claim is that a Member's aide shares the Member's constitutional privilege, we consider first whether and to what extent Senator Gravel himself is exempt from process or inquiry by a grand jury investigating the commission of a crime. Our frame of reference is Art. I, § 6, cl. 1, of the Constitution:

"The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United

> States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

The last sentence of the Clause provides Members of Congress with two distinct privileges. Except in cases of "Treason, Felony and Breach of the Peace," the Clause shields Members from arrest while attending or traveling to and from a session of their House. History reveals, and prior cases so hold, that this part of the Clause exempts Members from arrest in civil cases only. "When the Constitution was adopted, arrests in civil suits were still common in America. It is only to such arrests that the provision applies." *Long* v. *Ansell,* 293 U. S. 76, 83 (1934) (footnote omitted). "Since . . . the terms treason, felony and breach of the peace, as used in the constitutional provision relied upon, excepts from the operation of the privilege all criminal offenses, the conclusion results that the claim of privilege of exemption from arrest and sentence was without merit . . . ." *Williamson* v. *United States,* 207 U. S. 425, 446 (1908).[10] Nor does freedom from arrest confer immunity on a Member from service of process as a defendant in civil matters, *Long* v. *Ansell, supra,* at

[10] Williamson, United States Congressman, had been found guilty of conspiring to commit subornation of perjury in connection with proceedings for the purchase of public land. He objected to the court's passing sentence upon him and particularly protested that any imprisonment would deprive him of his constitutional right to "go to, attend at and return from the ensuing session of Congress." *Williamson* v. *United States,* 207 U. S. 425, 433 (1908). The Court rejected the contention that the Speech or Debate Clause freed legislators from accountability for criminal conduct.

82–83, or as a witness in a criminal case. "The constitution gives to every man, charged with an offence, the benefit of compulsory process, to secure the attendance of his witnesses. I do not know of any privilege to exempt members of congress from the service, or the obligations, of a *subpoena,* in such cases." *United States* v. *Cooper,* 4 Dall. 341 (1800) (Chase, J., sitting on Circuit). It is, therefore, sufficiently plain that the constitutional freedom from arrest does not exempt Members of Congress from the operation of the ordinary criminal laws, even though imprisonment may prevent or interfere with the performance of their duties as Members. *Williamson* v. *United States, supra;* cf. *Burton* v. *United States,* 202 U. S. 344 (1906). Indeed, implicit in the narrow scope of the privilege of freedom from arrest is, as Jefferson noted, the judgment that legislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons. T. Jefferson, Manual of Parliamentary Practice, S. Doc. No. 92–1, p. 437 (1971).

In recognition, no doubt, of the force of this part of § 6, Senator Gravel disavows any assertion of general immunity from the criminal law. But he points out that the last portion of § 6 affords Members of Congress another vital privilege—they may not be questioned in any other place for any speech or debate in either House. The claim is not that while one part of § 6 generally permits prosecutions for treason, felony, and breach of the peace, another part nevertheless broadly forbids them. Rather, his insistence is that the Speech or Debate Clause at the very least protects him from criminal or civil liability and from questioning elsewhere than in the Senate, with respect to the events occurring at the subcommittee hearing at which the Pentagon Papers were introduced into the public record. To us this claim is incontrovertible.

The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process. We have no doubt that Senator Gravel may not be made to answer—either in terms of questions or in terms of defending himself from prosecution—for the events that occurred at the subcommittee meeting. Our decision is made easier by the fact that the United States appears to have abandoned whatever position it took to the contrary in the lower courts.

Even so, the United States strongly urges that because the Speech or Debate Clause confers a privilege only upon "Senators and Representatives," Rodberg himself has no valid claim to constitutional immunity from grand jury inquiry. In our view, both courts below correctly rejected this position. We agree with the Court of Appeals that for the purpose of construing the privilege a Member and his aide are to be "treated as one," *United States* v. *Doe*, 455 F. 2d, at 761; or, as the District Court put it: the "Speech or Debate Clause prohibits inquiry into things done by Dr. Rodberg as the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally." *United States* v. *Doe*, 332 F. Supp., at 937–938. Both courts recognized what the Senate of the United States urgently presses here: that it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the

Members' performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary, *United States* v. *Johnson,* 383 U. S. 169, 181 (1966)—will inevitably be diminished and frustrated.

The Court has already embraced similar views in *Barr* v. *Matteo,* 360 U. S. 564 (1959), where, in immunizing the Acting Director of the Office of Rent Stabilization from liability for an alleged libel contained in a press release, the Court held that the executive privilege recognized in prior cases could not be restricted to those of cabinet rank. As stated by Mr. Justice Harlan, the "privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy." *Id.,* at 572–573 (footnote omitted).

It is true that the Clause itself mentions only "Senators and Representatives," but prior cases have plainly not taken a literalistic approach in applying the privilege. The Clause also speaks only of "Speech or Debate," but the Court's consistent approach has been that to confine the protection of the Speech or Debate Clause to words spoken in debate would be an unacceptably narrow view. Committee reports, resolutions, and the act of voting are equally covered; "[i]n short, . . . things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson,* 103 U. S. 168, 204 (1881), quoted

with approval in *United States* v. *Johnson*, 383 U. S., at 179. Rather than giving the Clause a cramped construction, the Court has sought to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator. We have little doubt that we are neither exceeding our judicial powers nor mistakenly construing the Constitution by holding that the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself.

Nor can we agree with the United States that our conclusion is foreclosed by *Kilbourn* v. *Thompson, supra*, *Dombrowski* v. *Eastland*, 387 U. S. 82 (1967), and *Powell* v. *McCormack*, 395 U. S. 486 (1969), where the speech or debate privilege was held unavailable to certain House and committee employees. Those cases do not hold that persons other than Members of Congress are beyond the protection of the Clause when they perform or aid in the performance of legislative acts. In *Kilbourn*, the Speech or Debate Clause protected House Members who had adopted a resolution authorizing Kilbourn's arrest; that act was clearly legislative in nature. But the resolution was subject to judicial review insofar as its execution impinged on a citizen's rights as it did there. That the House could with impunity order an unconstitutional arrest afforded no protection for those who made the arrest. The Court quoted with approval from *Stockdale* v. *Hansard*, 9 Ad. & E. 1, 112 Eng. Rep. 1112 (K. B. 1839): " 'So if the speaker by authority of the House order an illegal act, though that authority shall exempt him from question, his order shall no more justify the person who executed it than King Charles's warrant for levying ship-money could justify his reve-

nue officer,' " 103 U. S., at 202.[11] The Speech or Debate Clause could not be construed to immunize an illegal arrest even though directed by an immune legislative act. The Court was careful to point out that the Members themselves were not implicated in the actual arrest, *id.*, at 200, and, significantly enough, reserved the question whether there might be circumstances in which "there may . . . be things done, *in the one House or the other*, of an extraordinary character, for which the members who take part in the act may be held legally responsible." 103 U. S., at 204 (emphasis added).

Dombrowski v. *Eastland, supra,* is little different in principle. The Speech or Debate Clause there protected a Senator, who was also a subcommittee chairman, but not the subcommittee counsel. The record contained no evidence of the Senator's involvement in any activity that could result in liability, 387 U. S., at 84, whereas the committee counsel was charged with conspiring with state officials to carry out an illegal seizure of records that the committee sought for its own proceedings. *Ibid.* The committee counsel was deemed protected to

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[11] In *Kilbourn* v. *Thompson,* 103 U. S. 168, 198 (1881), the Court noted a second example, used by Mr. Justice Coleridge in *Stockdale* v. *Hansard,* 9 Ad. & E. 1, 225–226, 112 Eng. Rep. 1112, 1196–1197 (K. B. 1839): " 'Let me suppose, by way of illustration, an extreme case; the House of Commons resolves that any one wearing a dress of a particular manufacture is guilty of a breach of privilege, and orders the arrest of such persons by the constable of the parish. An arrest is made and action brought, to which the order of the House is pleaded as a justification. . . . In such a case as the one supposed, the plaintiff's counsel would insist on the distinction between power and privilege; and no lawyer can seriously doubt that it exists: but the argument confounds them, and forbids us to enquire, in any particular case, whether it ranges under the one or the other. I can find no principle which sanctions this.' "

some extent by legislative privilege, but it did not shield him from answering as yet unproved charges of conspiring to violate the constitutional rights of private parties. Unlawful conduct of this kind the Speech or Debate Clause simply did not immunize.

Powell v. *McCormack* reasserted judicial power to determine the validity of legislative actions impinging on individual rights—there the illegal exclusion of a representative-elect—and to afford relief against House aides seeking to implement the invalid resolutions. The Members themselves were dismissed from the case because shielded by the Speech or Debate Clause both from liability for their illegal legislative act and from having to defend themselves with respect to it. As in *Kilbourn,* the Court did not reach the question "whether under the Speech or Debate Clause petitioners would be entitled to maintain this action solely against the members of Congress where no agents participated in the challenged action and no other remedy was available." 395 U. S., at 506 n. 26.

None of these three cases adopted the simple proposition that immunity was unavailable to congressional or committee employees because they were not Representatives or Senators; rather, immunity was unavailable because they engaged in illegal conduct that was not entitled to Speech or Debate Clause protection. The three cases reflect a decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings. In *Kilbourn,* the Sergeant-at-Arms was executing a legislative order, the issuance of which fell within the Speech or Debate Clause; in *Eastland,* the committee counsel was gathering information for a hearing; and in *Powell,* the

Clerk and Doorkeeper were merely carrying out directions that were protected by the Speech or Debate Clause. In each case, protecting the rights of others may have to some extent frustrated a planned or completed legislative act; but relief could be afforded without proof of a legislative act or the motives or purposes underlying such an act. No threat to legislative independence was posed, and Speech or Debate Clause protection did not attach.

None of this, as we see it, involves distinguishing between a Senator and his personal aides with respect to legislative immunity. In *Kilbourn*-type situations, both aide and Member should be immune with respect to committee and House action leading to the illegal resolution. So, too, in *Eastland*, as in this litigation, senatorial aides should enjoy immunity for helping a Member conduct committee hearings. On the other hand, no prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances. Such acts are no more essential to legislating than the conduct held unprotected in *United States* v. *Johnson*, 383 U. S. 169 (1966).[12]

The United States fears the abuses that history reveals have occurred when legislators are invested with the power to relieve others from the operation of otherwise valid civil and criminal laws. But these abuses, it seems to us, are for the most part obviated if the privilege applicable to the aide is viewed, as it must be, as the

[12] Senator Gravel is willing to assume that if he personally had "stolen" the Pentagon Papers, and that act were a crime, he could be prosecuted, as could aides or other assistants who participated in the theft. Consolidated Brief for Senator Gravel 93.

privilege of the Senator, and invocable only by the Senator or by the aide on the Senator's behalf,[13] and if in all events the privilege available to the aide is confined to those services that would be immune legislative conduct if performed by the Senator himself. This view places beyond the Speech or Debate Clause a variety of services characteristically performed by aides for Members of Congress, even though within the scope of their employment. It likewise provides no protection for criminal conduct threatening the security of the person or property of others, whether performed at the direction of the Senator in preparation for or in execution of a legislative act or done without his knowledge or direction. Neither does it immunize Senator or aide from testifying at trials or grand jury proceedings involving third-party crimes where the questions do not require testimony about or impugn a legislative act. Thus our refusal to distinguish between Senator and aide in applying the Speech or Debate Clause does not mean that Rodberg is for all purposes exempt from grand jury questioning.

II

We are convinced also that the Court of Appeals correctly determined that Senator Gravel's alleged arrangement with Beacon Press to publish the Pentagon Papers was not protected speech or debate within the meaning of Art. I, § 6, cl. 1, of the Constitution.

Historically, the English legislative privilege was not viewed as protecting republication of an otherwise immune libel on the floor of the House. *Stockdale* v. *Hansard*, 9 Ad. & E., at 114, 112 Eng. Rep., at 1156, recognized that "[f]or speeches made in Parliament by a member to the prejudice of any other person, or hazardous

[13] It follows that an aide's claim of privilege can be repudiated and thus waived by the Senator.

to the public peace, that member enjoys complete impunity." But it was clearly stated that "if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher." [14]

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[14] *Stockdale* extensively reviewed the precedents and their interplay with the privilege so forcefully recognized in the Bill of Rights of 1689: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 W. & M., Sess. 2, c. 2. From these cases, including *Rex* v. *Creevey*, 1 M. & S. 273, 105 Eng. Rep. 102 (K. B. 1813); *Rex* v. *Wright*, 8 T. R. 293, 101 Eng. Rep. 1396 (K. B. 1799); *Rex* v. *Abingdon*, 1 Esp. 226, 170 Eng. Rep. 337 (N. P. 1794); *Rex* v. *Williams*, 2 Show. K. B. 471, 89 Eng. Rep. 1048 (1686), it is apparent that to the extent English precedent is relevant to the Speech or Debate Clause there is little, if any, support for Senator Gravel's position with respect to republication. Parliament reacted to *Stockdale* v. *Hansard* by adopting the Parliamentary Papers Act of 1840, 3 & 4 Vict., c. 9, which stayed proceedings in all cases where it could be shown that publication was by order of a House of Parliament and was a bona fide report, printed and circulated without malice. See generally C. Wittke, The History of English Parliamentary Privilege (1921).

Gravel urges that *Stockdale* v. *Hansard* was later repudiated in *Wason* v. *Walter*, L. R. 4 Q. B. 73 (1868), which held a proprietor immune from civil libel for an accurate republication of a debate in the House of Lords. But the immunity established in *Wason* was not founded on parliamentary privilege, *id.*, at 84, but upon analogy to the privilege for reporting judicial proceedings. *Id.*, at 87–90. The *Wason* court stated its "unhesitating and unqualified adhesion" to the "masterly judgments" rendered in *Stockdale* and characterized the question before it as whether republication, quite apart from any assertion of parliamentary privilege, was "in itself privileged and lawful." *Id.*, at 86–87. That the privileges for nonmalicious republication of parliamentary and judicial proceedings—later established as qualified—were construed as coextensive in all respects, *id.*, at 95, further underscores the inappositeness of reading *Wason* as based upon parliamentary privilege that, like the Speech or Debate Clause, is absolute. Much later Holdsworth was to comment that at the time of *Wason* the distinction between absolute and qualified privilege had not been worked out and that the "part played by

This was accepted in *Kilbourn* v. *Thompson* as a "sound statement of the legal effect of the Bill of Rights and of the parliamentary law of England" and as a reasonable basis for inferring "that the framers of the Constitution meant the same thing by the use of language borrowed from that source." 103 U. S., at 202.

Prior cases have read the Speech or Debate Clause "broadly to effectuate its purposes," *United States* v. *Johnson*, 383 U. S., at 180, and have included within its reach anything "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson*, 103 U. S., at 204; *United States* v. *Johnson*, 383 U. S., at 179. Thus, voting by Members and committee reports are protected; and we recognize today—as the Court has recognized before, *Kilbourn* v. *Thompson*, 103 U. S., at 204; *Tenney* v. *Brandhove*, 341 U. S. 367, 377–378 (1951)—that a Member's conduct at legislative committee hearings, although subject to judicial review in various circumstances, as is legislation itself, may not be made the basis for a civil or criminal judgment against a Member because that conduct is within the "sphere of legitimate legislative activity." *Id.*, at 376.[15]

But the Clause has not been extended beyond the legis-

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malice in the tort and crime of defamation" probably helped retard recognition of a qualified privilege. 8 W. Holdsworth, History of English Law 377 (1926).

[15] The Court in *Tenney* v. *Brandhove*, 341 U. S. 367, 376–377 (1951), was equally clear that "legislative activity" is not all-encompassing, nor may its limits be established by the Legislative Branch: "Legislatures may not of course acquire power by an unwarranted extension of privilege. The House of Commons' claim of power to establish the limits of its privilege has been little more than a pretense since *Ashby* v. *White*, 2 Ld. Raym. 938, 3 *id.* 320. This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role. *Kilbourn* v. *Thompson*, 103 U. S. 168; *Marshall* v. *Gordon*, 243 U. S. 521; compare *McGrain* v. *Daugherty*, 273 U. S. 135, 176."

lative sphere. That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature. Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute—but such conduct, though generally done, is not protected legislative activity. *United States* v. *Johnson* decided at least this much. "No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process." 383 U. S., at 172. Cf. *Burton* v. *United States,* 202 U. S., at 367–368.

Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations." *United States* v. *Doe,* 455 F. 2d, at 760.

Here, private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the Senate; nor does questioning as to private publication threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence. The Senator

had conducted his hearings; the record and any report that was forthcoming were available both to his committee and the Senate. Insofar as we are advised, neither Congress nor the full committee ordered or authorized the publication.[16] We cannot but conclude that the Senator's arrangements with Beacon Press were not part and parcel of the legislative process.

There are additional considerations. Article I, § 6, cl. 1, as we have emphasized, does not purport to confer a general exemption upon Members of Congress from liability or process in criminal cases. Quite the contrary is true. While the Speech or Debate Clause recognizes speech, voting, and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts. If republication of these classified papers would be a crime under an Act of Congress, it would not be entitled to immunity under the Speech or Debate Clause. It also appears that the grand jury was pursuing this very subject in the normal course of a valid investigation. The Speech or Debate Clause does not in our view extend immunity to Rodberg, as a Senator's aide, from testifying before the grand jury about the arrangement between Senator Gravel and Beacon Press or about his own participation, if any, in the

[16] The sole constitutional claim asserted here is based on the Speech or Debate Clause. We need not address issues that may arise when Congress or either House, as distinguished from a single Member, orders the publication and/or public distribution of committee hearings, reports, or other materials. Of course, Art. I, § 5, cl. 3, requires that each House "keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . . ." This Clause has not been the subject of extensive judicial examination. See *Field* v. *Clark*, 143 U. S. 649, 670–671 (1892); *United States* v. *Ballin*, 144 U. S. 1, 4 (1892).

alleged transaction, so long as legislative acts of the Senator are not impugned.

III

Similar considerations lead us to disagree with the Court of Appeals insofar as it fashioned, tentatively at least, a nonconstitutional testimonial privilege protecting Rodberg from any questioning by the grand jury concerning the matter of republication of the Pentagon Papers. This privilege, thought to be similar to that protecting executive officials from liability for libel, see *Barr* v. *Matteo,* 360 U. S. 564 (1959), was considered advisable "[t]o the extent that a congressman has responsibility to inform his constituents . . . ." 455 F. 2d, at 760. But we cannot carry a judicially fashioned privilege so far as to immunize criminal conduct proscribed by an Act of Congress or to frustrate the grand jury's inquiry into whether publication of these classified documents violated a federal criminal statute. The so-called executive privilege has never been applied to shield executive officers from prosecution for crime, the Court of Appeals was quite sure that third parties were neither immune from liability nor from testifying about the republication matter, and we perceive no basis for conferring a testimonial privilege on Rodberg as the Court of Appeals seemed to do.

IV

We must finally consider, in the light of the foregoing, whether the protective order entered by the Court of Appeals is an appropriate regulation of the pending grand jury proceedings.

Focusing first on paragraph two of the order, we think the injunction against interrogating Rodberg with respect to any act, "in the broadest sense," performed by him within the scope of his employment, overly restricts

the scope of grand jury inquiry. Rodberg's immunity, testimonial or otherwise, extends only to legislative acts as to which the Senator himself would be immune. The grand jury, therefore, if relevant to its investigation into the possible violations of the criminal law, and absent Fifth Amendment objections, may require from Rodberg answers to questions relating to his or the Senator's arrangements, if any, with respect to republication or with respect to third-party conduct under valid investigation by the grand jury, as long as the questions do not implicate legislative action of the Senator. Neither do we perceive any constitutional or other privilege that shields Rodberg, any more than any other witness, from grand jury questions relevant to tracing the source of obviously highly classified documents that came into the Senator's possession and are the basic subject matter of inquiry in this case, as long as no legislative act is implicated by the questions.[17]

Because the Speech or Debate Clause privilege applies both to Senator and aide, it appears to us that paragraph one of the order, alone, would afford ample protection for the privilege if it forbade questioning any witness, including Rodberg: (1) concerning the Sen-

[17] The Court of Appeals held that the Speech or Debate Clause protects aides as well as Senators and that while third parties may be questioned about the source of a Senator's information, neither aide nor Senator need answer such inquiries. The Government's position is that the aide has no protection under the Speech or Debate Clause and may be questioned even about legislative acts. A contrary ruling, the Government fears, would invite great abuse. On the other hand, Gravel contends that the Court of Appeals insufficiently protected the Senator both with respect to the matter of republication and with respect to the scope of inquiry permitted the grand jury in questioning third-party witnesses with whom the Senator and his aides dealt. Hence, we are of the view that both the question of the aide's immunity and the question of the extent of that immunity are properly before us in this case. And surely we are not bound by the Government's view of the scope of the privilege.

ator's conduct, or the conduct of his aides, at the June 29, 1971, meeting of the subcommittee; [18] (2) concerning the motives and purposes behind the Senator's conduct, or that of his aides, at that meeting; (3) concerning communications between the Senator and his aides during the term of their employment and related to said meeting or any other legislative act of the Senator; (4) except as it proves relevant to investigating possible third-party crime, concerning any act, in itself not criminal, performed by the Senator, or by his aides in the course of their employment, in preparation for the subcommittee hearing. We leave the final form of such an order to the Court of Appeals in the first instance, or, if that court prefers, to the District Court.

The judgment of the Court of Appeals is vacated and the cases are remanded to that court for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE STEWART, dissenting in part.

The Court today holds that the Speech or Debate Clause does not protect a Congressman from being forced to testify before a grand jury about sources of information

[18] Having established that neither the Senator nor Rodberg is subject to liability for what occurred at the subcommittee hearing, we perceive no basis for inquiry of either Rodberg or third parties on this subject. If it proves material to establish for the record the fact of publication at the subcommittee hearing, which seems undisputed, the public record of the hearing would appear sufficient for this purpose. We do not intend to imply, however, that in no grand jury investigations or criminal trials of third parties may third-party witnesses be interrogated about legislative acts of Members of Congress. As for inquiry of Rodberg about third-party crimes, we are quite sure that the District Court has ample power to keep the grand jury proceedings within proper bounds and to foreclose improvident harassment and fishing expeditions into the affairs of a Member of Congress that are no proper concern of the grand jury or the Executive Branch.

used in preparation for legislative acts. This critical question was not embraced in the petitions for certiorari. It was not dealt with in the written briefs. It was addressed only tangentially during the oral arguments. Yet it is a question with profound implications for the effective functioning of the legislative process. I cannot join in the Court's summary resolution of so vitally important a constitutional issue.

In preparing for legislative hearings, debates, and roll calls, a member of Congress obviously needs the broadest possible range of information. Valuable information may often come from sources in the Executive Branch or from citizens in private life. And informants such as these may be willing to relate information to a Congressman only in confidence, fearing that disclosure of their identities might cause loss of their jobs or harassment by their colleagues or employers. In fact, I should suppose it to be self-evident that many such informants would insist upon an assurance of confidentiality before revealing their information. Thus, the acquisition of knowledge through a promise of nondisclosure of its source will often be a necessary concomitant of effective legislative conduct, if the members of Congress are properly to perform their constitutional duty.

The Court of Appeals for the First Circuit recognized the importance of the information-gathering process in the performance of the legislative function. It held that the Speech or Debate Clause bars all grand jury questioning of a member of Congress regarding the sources of his information. The Court of Appeals reasoned that to allow a "grand jury to question a senator about his sources would chill both the vigor with which legislators seek facts, and the willingness of potential sources to supply them." *United States* v. *Doe*, 455 F. 2d 753, 758–759. The Government *did not seek review of this ruling*, but rather sought certiorari on the question whether the

Speech or Debate Clause bars a grand jury from questioning congressional aides about privileged actions of Senators or Representatives.[1]

The Court, however, today decides, *sua sponte,* that a Member of Congress may, despite the Speech or Debate Clause, be compelled to testify before a grand jury concerning the sources of information used by him in the performance of his legislative duties, if such an inquiry "*proves relevant to investigating possible third-party crime.*" *Ante,* at 629 (emphasis supplied).[2] In my view, this ruling is highly dubious in view of the basic purpose of the Speech or Debate Clause—"to prevent intimidation [of Congressmen] by the executive and accountability before a possibly hostile judiciary." *United States* v. *Johnson,* 383 U. S. 169, 181.

Under the Court's ruling, a Congressman may be subpoenaed by a vindictive Executive to testify about informants who have not committed crimes and who have no knowledge of crime. Such compulsion can occur, because the judiciary has traditionally imposed virtually no limitations on the grand jury's broad investigatory powers; grand jury investigations are not limited in scope

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[1] As stated in its petition for certiorari, the Government asked us to consider:

"Whether Article 1, Section 6, of the Constitution providing that '. . . for any Speech or Debate in either House,' the Senators and Representatives 'shall not be questioned in any other Place' bars a grand jury from questioning aides of members of Congress and other persons about matters that may touch on activities of a member of Congress which are protected 'Speech or Debate.'"

The Government also asked us to consider:

"Whether an aide of a member of Congress has a common law privilege not to testify before a grand jury concerning private republication of material which his Senator-employer had introduced into the record of a Senate subcommittee."

We granted certiorari on both questions. 405 U. S. 916.

[2] See also *ante,* at 622, 628.

to specific criminal acts, and standards of materiality and relevance are greatly relaxed.[3] But even if the Executive had reason to believe that a Member of Congress had knowledge of a specific probable violation of law, it is by no means clear to me that the Executive's interest in the administration of justice must *always* override the public interest in having an informed Congress. Why should we not, given the tension between two competing interests, *each* of constitutional dimensions, balance the claims of the Speech or Debate Clause against the claims of the grand jury in the particularized contexts of specific cases? And why are not the Houses of Congress the proper institutions in most situations to impose sanctions upon a Representative or Senator who withholds information about crime acquired in the course of his legislative duties?[4]

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[3] See, *e. g.*, *Wilson* v. *United States*, 221 U. S. 361; *Hendricks* v. *United States*, 223 U. S. 178; *United States* v. *Johnson*, 319 U. S. 503. See generally *Holt* v. *United States*, 218 U. S. 245; *Costello* v. *United States*, 350 U. S. 359.

[4] During oral argument, the Solicitor General virtually conceded, in the course of arguing that aides should not enjoy the same testimonial privilege as Congressmen, that a Senator could *not* be called before the grand jury to testify about the sources of his information:

"Q. Mr. Solicitor, am I correct that you wouldn't be able to question the Senator as to where he got the papers from?

"A. Oh, Mr. Justice, we are not able to question the Senator about anything insofar as it relates to speech or debate.

"Q. Well, this was related, you agree, to speech and debate?

"A. I am not contending to the contrary. . . ." Tr. of Oral Arg., Apr. 20, 1972, pp. 27–28.

The following exchange also took place:

"Q. You can't ask a Senator where you got the material you used in your speech.

"A. Yes, Mr. Justice.

"Q. You can't.

"A. Yes." *Id.*, at 29.

At another point in the oral argument, the Solicitor General said

I am not prepared to accept the Court's rigid conclusion that the Executive may always compel a legislator to testify before a grand jury about sources of information used in preparing for legislative acts. For that reason, I dissent from that part of the Court's opinion that so inflexibly and summarily decides this vital question.

MR. JUSTICE DOUGLAS, dissenting.

I would construe the Speech or Debate Clause [1] to insulate Senator Gravel and his aides from inquiry concerning the Pentagon Papers, and Beacon Press from inquiry concerning publication of them, for that publication was but another way of informing the public as to what had gone on in the privacy of the Executive Branch concerning the conception and pursuit of the so-called "war" in Vietnam. Alternatively, I would hold that Beacon Press is protected by the First Amendment from prosecution or investigations for publishing or undertaking to publish the Pentagon Papers.

Gravel, Senator from Alaska, was Chairman of the Senate Subcommittee on Public Buildings and Grounds. He convened a meeting of the Subcommittee and read to it a summary of the so-called Pentagon Papers. He then introduced "the entire Papers, allegedly some 47 volumes and said to contain seven million words, as an

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that even when a Senator or Representative has knowledge of crime as a result of legislative acts "[t]hey can't even be required to respond to questions with respect to their speeches and debates. That is a great and historic privilege which ought to be maintained which I fully support but which does not extend to any other persons than Senators and Representatives." *Id.*, at 32.

[1] The Speech or Debate Clause included in Art. I, § 6, cl. 1, of the Constitution provides as respects Senators and Representatives that "for any Speech or Debate in either House, they shall not be questioned in any other Place."

exhibit." 455 F. 2d 753, 756. Thereafter, he supplied a copy of the papers to the Beacon Press, a Boston publishing house, on the understanding that it would publish the papers without profit to the Senator. A grand jury was investigating the release of the Pentagon Papers and subpoenaed one Rodberg, an aide to Senator Gravel, to testify. Rodberg moved to quash the subpoena; and on the same day the Senator moved to intervene. Intervention was granted and in due course the Court of Appeals entered the following order which is now before us for review:

> "(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor, if the questions are directed to the motives or purposes behind the Senator's conduct at that meeting, about any communications with him or with his aides regarding the activities of the Senator or his aides during the period of their employment, in preparation for and related to said meeting.
>
> "(2) Dr. Leonard S. Rodberg may not be questioned about his own actions in the broadest sense, including observations and communications, oral or written, by or to him or coming to his attention while being interviewed for, or after having been engaged as a member of Senator Gravel's personal staff to the extent that they were in the course of his employment."

I

Both the introduction of the Pentagon Papers by Senator Gravel into the record before his Subcommittee and his efforts to publish them were clearly covered by

the Speech or Debate Clause, as construed in *Kilbourn* v. *Thompson,* 103 U. S. 168, 204:

> "It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it." [2]

One of the things normally done by a Member "in relation to the business before it" is the introduction of documents or other exhibits in the record the committee or subcommittee is making. The introduction of a document into a record of the Committee or subcommittee by its Chairman certainly puts it in the public domain. Whether a particular document is relevant to the inquiry of the committee may be questioned by the Senate in the exercise of its power to prescribe rules for the governance and discipline of wayward members. But there is only one instance, as I see it, where supervisory power over that issue is vested in the courts, and that is where a witness before a committee is prosecuted for contempt and he makes the defense that the question he refused to answer was not germane to the legislative inquiry or within its permissible range. See *Uphaus* v. *Wyman,* 360 U. S. 72; *Kilbourn* v. *Thompson, supra,* at 190.

In all other situations, however, the judiciary's view of the motives or germaneness of a Senator's conduct

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[2] And see *United States* v. *Johnson,* 383 U. S. 169, 172, 177; and *Tenney* v. *Brandhove,* 341 U. S. 367, 376.

before a committee is irrelevant. For, "[t]he claim of an unworthy purpose does not destroy the privilege." *Tenney* v. *Brandhove,* 341 U. S. 367, 377. If there is an abuse, there is a remedy; but it is legislative, not judicial.

As to Senator Gravel's efforts to publish the Subcommittee record's contents, wide dissemination of this material as an educational service is as much a part of the Speech or Debate Clause philosophy as mailing under a frank a Senator's or a Congressman's speech across the Nation. As mentioned earlier, "[i]t is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. . . . The informing function of Congress should be preferred even to its legislative function." W. Wilson, Congressional Government 303 (1885), quoted with approval in *Tenney* v. *Brandhove, supra,* at 377 n. 6. "From the earliest times in its history, the Congress has assiduously performed an 'informing function,'" *Watkins* v. *United States,* 354 U. S. 178, 200 n. 33. "Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them." *Bond* v. *Floyd,* 385 U. S. 116, 136.

We said in *United States* v. *Johnson,* 383 U. S. 169, 179, that the Speech or Debate Clause established a "legislative privilege" that protected a member of Congress against prosecution "by an unfriendly executive and conviction by a hostile judiciary" in order, as Mr. Justice Harlan put it, to ensure "the independence of the legislature." That hostility emanates from every stage of the present proceedings. It emphasizes the need to construe the Speech or Debate Clause generously, not niggardly. If republication of a Senator's speech in a newspaper carries the privilege, as it doubtless does, then republication of the exhibits introduced

at a hearing before Congress must also do so. That means that republication by Beacon Press is within the ambit of the Speech or Debate Clause and that the confidences of the Senator in arranging it are not subject to inquiry "in any other Place" than the Congress.

It is said that though the Senator is immune from questioning as to what he said and did in preparation for the committee hearing and in conducting it, his aides may be questioned in his stead. Such easy circumvention of the Speech or Debate Clause would indeed make it a mockery. The aides and agents such as Beacon Press must be taken as surrogates for the Senator and the confidences of the job that they enjoy are his confidences that the Speech or Debate Clause embraces.

II

The secrecy of documents in the Executive Department has been a bone of contention between it and Congress from the beginning.[3] Most discussions have

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[3] See Developments In The Law—The National Security Interest and Civil Liberties, 85 Harv. L. Rev. 1130, 1207–1215 (1972); Note, The Right of Government Employees to Furnish Information to Congress: Statutory and Constitutional Aspects, 57 Va. L. Rev. 885–887 (1971); Berger, Executive Privilege v. Congressional Inquiry, 12 U. C. L. A. L. Rev. 1044 (1965); Schwartz, Executive Privilege and Congressional Investigatory Power, 47 Calif. L. Rev. 3 (1959); Executive Privilege: The Withholding of Information by the Executive, Hearing on S. 1125 before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 92d Cong., 1st Sess. (1971). There is no express statutory authority for the classification procedure used currently by the bureaucracies, although it has been claimed that Congress has recognized it in such measures as the exemptions from the disclosure requirements of the Freedom of Information Act, 5 U. S. C. § 552 (b) and the espionage laws, 18 U. S. C. §§ 792–799. Rather, the classification regime has been implemented through a series of executive orders

centered on the scope of the executive privilege in stamping documents as "secret," "top secret," "confidential," and so on, thus withholding them from the eyes of Congress and the press. The practice has reached large proportions, it being estimated that

(1) Over 30,000 people in the Executive Branch have the power to wield the classification stamp.[4]

(2) The Department of State, the Department of Defense, and the Atomic Energy Commission have over 20 million classified documents in their files.

(3) Congress appropriates approximately $15 billion annually without most of its members or the public or the press knowing for what purposes the money is to be used.[5]

The problem looms large as one of separation of

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described in Developments In The Law, *supra*, at 1192–1198. It has also been claimed that several sections of Art. II (such as the designation of the President as Commander in Chief of the Army and Navy) confer upon the Executive an inherent power to classify documents. See Report of the Commission on Government Security, S. Doc. No. 64, 85th Cong., 1st Sess., 158 (1957).

[4] Hearings on S. 1125, *supra*, n. 3, at 517–518. One estimate of the number of officials who can classify documents is even higher. In the Department of Defense alone, 803 persons have the authority to classify documents Top Secret; 7,687 have permission to stamp them Secret, and 31,048 have the authorization to denominate papers Confidential. United States Government Information Policies and Practices—The Pentagon Papers, Hearings before a Subcommittee of the House Committee on Government Operations, 92d Cong., 1st Sess., pt. 2, p. 599 (statement of David Cooke, Deputy Assistant Secretary of Defense).

[5] Senator Fulbright, chairman of the Senate Foreign Relations Committee, recently testified that his committee had been so unsuccessful in obtaining accurate information about the Vietnam war from the Executive Branch that it was required to hire its own investigators and send them to Southeast Asia. Hearings on S. 1125, *supra*, n. 3, at 206.

powers. Woodrow Wilson wrote about it in terms of the "informing function" of Congress: [6]

> "It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function. The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration. The talk on the part of Congress which we sometimes justly condemn is the profitless squabble of words over frivolous bills or selfish party issues. It would be hard to conceive of there being too much talk about the practical concerns and processes of government. Such talk it is which, when earnestly and purposefully conducted, clears the public mind and shapes the demands of public opinion."

Classification of documents is a concern of the Congress. It is, however, no concern of the courts, as I see it, how a

[6] Congressional Government 303–304 (1885).

document is stamped in an Executive Department or whether a committee of Congress can obtain the use of it. The federal courts do not sit as an ombudsman refereeing the disputes between the other two branches. The federal courts do become vitally involved whenever their power is sought to be invoked either to protect the press against censorship as in *New York Times Co.* v. *United States*, 403 U. S. 713, or to protect the press against punishment for publishing "secret" documents or to protect an individual against his disclosure of their contents for any of the purposes of the First Amendment.

Forcing the press to become the Government's co-conspirator in maintaining state secrets is at war with the objectives of the First Amendment. That guarantee was designed in part to ensure a meaningful version of self-government by immersing the people in a "steady, robust, unimpeded, and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and re-examination." *Branzburg* v. *Hayes*, *post*, at 715 (DOUGLAS, J., dissenting); *Brandenburg* v. *Ohio*, 395 U. S. 444; *Stanley* v. *Georgia*, 394 U. S. 557, 564; *Lamont* v. *Postmaster General*, 381 U. S. 301, 308 (BRENNAN, J., concurring); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270. As I have said, in dissent, elsewhere, *e. g.*, *Branzburg*, *supra*; *Kleindienst* v. *Mandel*, *post*, at 771, that Amendment is aimed at protecting not only speakers and writers but also listeners and readers. The essence of our form of governing was at the heart of Mr. Justice Black's reminder in the Pentagon Papers case that "[t]he press was protected so that it could bare the secrets of government and inform the people." 403 U. S., at 717 (concurring opinion). Similarly, Senator Sam Ervin has observed: "When the people do not know what their government is doing, those who govern are not accountable for their actions—and accountability is basic to the democratic system. By using devices of secrecy, the gov-

ernment attains the power to 'manage' the news and through it to manipulate public opinion." [7] Ramsey Clark as Attorney General expressed a similar sentiment: "If government is to be truly of, by, and for the people, the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy." [8] And see Meiklejohn, The First Amendment Is An Absolute, 1961 Sup. Ct. Rev. 245; Press Freedoms Under Pressure: Report of the Twentieth Century Fund Task Force on the Government and the Press 109–117 (1972) (background paper by Fred Graham on access to news); M. Johnson, The Government Secrecy Controversy 39–41 (1967).

Jefferson in a letter to Madison, dated December 20, 1787, posed the question "whether peace is best preserved by giving energy to the government, or information to the people," and then answered, "This last is the most certain, and the most legitimate engine of government." 6 Writings of Thomas Jefferson 392 (Memorial ed. 1903).

Madison at the time of the Whiskey Rebellion spoke in the House against a resolution of censure against the groups stirring up the turmoil against that rebellion.

> " 'If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.' " Brant, The Madison Heritage, 35 N. Y. U. L. Rev. 882, 900.

Yet, as has been revealed by such exposés as the Pentagon Papers, the My Lai massacres, the Gulf of Tonkin "incident," and the Bay of Pigs invasion, the Government usually suppresses damaging news but high-

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[7] Secrecy in a Free Society, 213 Nation 454, 456 (1971).

[8] Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, 20 Ad. L. Rev. 263, 264 (1967).

lights favorable news. In this filtering process the secrecy stamp is the officials' tool of suppression and it has been used to withhold information which in "99½%" of the cases would present no danger to national security.[9] To refuse to publish "classified" reports would at times relegate a publisher to distributing only the press releases of Government or remaining silent; if he printed only the press releases or "leaks" he would become an arm of officialdom, not its critic. Rather, in my view, when a publisher obtains a classified document he should be free to print it without fear of retribution, unless it contains material directly bearing on future, sensitive planning of the Government.[10] By that test Beacon Press could with

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[9] United States Government Information Policies and Practices—The Pentagon Papers, Hearings before a Subcommittee of the House Committee on Government Operations, 92d Cong., 1st Sess., pt. 1, p. 97; Cong. Horton, The Public's Right to Know, 77 Case & Comm. 3, 5 (1972). We are told that the military has withheld as confidential a large selection of photographs showing atrocities against Vietnamese civilians wrought by both Communist and United States forces. Even a training manual devoted to the history of the Bolshevik revolution was dubbed secret by the military. Hearings, *supra*, pt. 3, at 966, 967 (testimony of former classification officer). And ordinary newspaper clippings of criticism aimed at the military have been routinely marked secret. *Id.*, pt. 1, at 100. Former Justice and former Ambassador to the United Nations Arthur Goldberg has stated: "I have read and prepared countless thousands of classified documents. In my experience, 75 percent of these documents should never have been classified in the first place; another 15 percent quickly outlived the need for secrecy; and only about 10 percent genuinely required restricted access over any significant period of time." *Id.*, pt. 1, at 12.

[10] Moreover, I would not even permit a conviction for the publication of documents related to future and sensitive planning where the jury was permitted, as it was in *United States* v. *Drummond*, 354 F. 2d 132, 152 (CA2), to consider the fact that the documents had been classified by the Executive Branch pursuant to its present overbroad system which, in my view, unnecessarily sweeps too much

impunity reproduce the Pentagon Papers inasmuch as their content "is all history, not future events. None of it is more recent than 1968." *New York Times Co.* v. *United States*, 403 U. S., at 722 n. 3 (concurring opinion).

The late Mr. Justice Harlan in the Pentagon Papers case said that in that situation the courts had only two restricted functions to perform: *first*, to ascertain whether the subject matter of the dispute lies within the proper compass of the President's constitutional power; and *second*, to insist that the head of the Executive Department concerned—whether State or Defense—determine if disclosure of the subject matter "would irreparably impair the national security." Beyond those two inquiries, he concluded, the judiciary may not go. *Id.*, at 757–758 (dissenting opinion).

My view is quite different. When the press stands before the court as a suspected criminal, it is the duty of the court to disregard what the prosecution claims is the executive privilege and to acquit the press or overturn the ruling or judgment against it, if the First Amendment and the assertion of the executive privilege conflict. For the executive privilege—nowhere made explicit in the Constitution—is necessarily subordinate to the express commands of the Constitution.

United States v. *Curtiss-Wright Corp.*, 299 U. S. 304, involved the question whether a proclamation issued by the President, pursuant to a Joint Resolution of the

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nonsensitive information into the locked files of the bureaucracies. In general, however, I agree that there may be situations and occasions in which the right to know must yield to other compelling and overriding interests. As Professor Henkin has observed, many deliberations in Government are kept confidential, such as the proceedings of grand juries or our own Conferences, despite the fact that the breadth of public knowledge is thereby diminished. Henkin, The Right To Know And The Duty To Withhold: The Case Of The Pentagon Papers, 120 U. Pa. L. Rev. 271, 274–275 (1971).

Congress, was adequate to sustain an indictment. The Court, in holding that it was, discussed at length the power of the President. The Court said that the power of the President in the field of international relations does not require as a basis an Act of Congress; but it added that his power "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *Id.*, at 320.

When the Executive Branch launches a criminal prosecution against the press, it must do so only under an Act of Congress. Yet Congress has no authority to place the press under the restraints of the executive privilege without "abridging" the press within the meaning of the First Amendment.

In related and analogous situations, federal courts have subordinated the executive privilege to the requirements of a fair trial.

Mr. Chief Justice Marshall in the trial of Aaron Burr ruled "[t]hat the president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession, is not controverted." *United States* v. *Burr*, 25 F. Cas. 187, 191 (No. 14,694) (CC Va. 1807). Yet he "may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the court from enforcing its production." *Ibid.* A letter to the President, he said, "may relate to public concerns" and not be "forced into public view." *Id.*, at 192. But where the paper was shown "to be essential to the justice of the case," *ibid.*, "the paper [should] be produced, or the cause be continued." *Ibid.*

Jencks v. *United States*, 353 U. S. 657, is in that tradition. It was a criminal prosecution for perjury, the telling evidence against the accused being the testimony of Government investigators. The defense asked for contemporary notes made by agents at the time. Refusal

was based on their confidential character. We held that to be reversible error.[11]

> "We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. Accord, *Roviaro* v. *United States,* 353 U. S. 53, 60–61. The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession." *Id.,* at 672.

Congress enacted the so-called Jencks Act, 18 U. S. C. § 3500, regulating the use of Government documents in criminal prosecutions. We sustained that Act. *Scales* v. *United States,* 367 U. S. 203, 258. Under the Act a defendant "on trial in a federal criminal prosecution is entitled, for impeachment purposes, to relevant and

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[11] In *Alderman* v. *United States,* 394 U. S. 165, we took a like course in requiring the prosecution to disclose to the defense records of unlawful electronic surveillance:

"It may be that the prospect of disclosure will compel the Government to dismiss some prosecutions in deference to national security or third-party interests. But this is a choice the Government concededly faces with respect to material which it has obtained illegally and which it admits, or which a judge would find, is arguably relevant to the evidence offered against the defendant." *Id.,* at 184.

A different rule obtains in civil suits where the government is not the moving party but is a defendant and has specified the terms on which it may be sued. *United States* v. *Reynolds,* 345 U. S. 1, 12.

competent statements of a government witness in possession of the Government touching the events or activities as to which the witness has testified at the trial. . . . The command of the statute is thus designed to further the fair and just administration of criminal justice, a goal of which the judiciary is the special guardian." *Campbell* v. *United States,* 365 U. S. 85, 92. And see *Clancy* v. *United States,* 365 U. S. 312.

The prosecution often dislikes to make public the identity of the informer on whose information its case rests. But his identity must be disclosed where his testimony is material to the trial. *Roviaro* v. *United States,* 353 U. S. 53. In other words, the desire for Government secrecy does not override the demands for a fair trial. And see *Scher* v. *United States,* 305 U. S. 251, 254. The constitutional demands for a fair trial, implicit in the concept of due process, *In re Murchison,* 349 U. S. 133, 136, override the Government's desire for secrecy, whether the identity of an informer or the executive privilege be involved. And see *Smith* v. *Illinois,* 390 U. S. 129.

The requirements of the First Amendment are not of lesser magnitude. They override any claim to executive privilege. As stated in *United States* v. *Curtiss-Wright Corp., supra,* the class of executive privilege "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." 299 U. S., at 320.

III

Aside from the question of the extent to which publishers can be penalized for printing classified documents, surely the First Amendment protects against all inquiry into the dissemination of information which, although once classified, has become part of the public domain.

To summon Beacon Press through its officials before the grand jury and to inquire into why it did what it did

and its publication plans is "abridging" the freedom of the press contrary to the command of the First Amendment. In light of the fact that these documents were part of the official Senate record,[12] Beacon Press has violated no valid law, and the grand jury's scrutiny of it reduces to "[e]xposure purely for the sake of exposure." *Uphaus* v. *Wyman*, 360 U. S., at 82 (BRENNAN, J., dissenting). As in *United States* v. *Rumely*, 345 U. S. 41, where a legislative committee inquired of a publisher of political tracts as to its customers' identities, "[i]f the present inquiry were sanctioned, the press would be subjected to harassment that in practical effect might be as serious as censorship." *Id.*, at 57 (concurring opinion). Under our Constitution the Government has no surveillance over the press. That includes, as we held in *New York Times Co.* v. *United States*, 403 U. S. 713, the prohibition against prior restraints. Yet criminal punishment for or investigations of what the press publishes, though a different species of abridgment, is nonetheless within the ban of the First Amendment.

The story of the Pentagon Papers is a chronicle of suppression of vital decisions to protect the reputations and political hides of men who worked an amazingly successful scheme of deception on the American people. They were successful not because they were astute but because the press had become a frightened, regimented, submissive instrument, fattening on favors from those in power and forgetting the great tradition of reporting. To allow the press further to be cowed by grand

[12] Republication of what has filled the Congressional Record is commonplace. Newspapers, television, and radio use its contents constantly. I see no difference between republication of a paragraph and republication of material amounting to a book. Once a document or a series of documents is in the record of the Senate or House or one of its committees it is in the public domain.

jury inquiries and prosecution is to carry the concept of "abridging" the press to frightening proportions.

What would be permissible if Beacon Press "stole" the Pentagon Papers is irrelevant to today's decision. What Beacon Press plans to publish is matter introduced into a public record by a Senator acting under the full protection of the Speech or Debate Clause.[13] In light of the command of the First Amendment we have no choice but to rule that here government, not the press, is lawless.

I would affirm the judgment of the Court of Appeals except as to Beacon Press, in which case I would reverse.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS, and MR. JUSTICE MARSHALL, join, dissenting.

The facts of this litigation, which are detailed by the Court, and the objections to overclassification of documents by the Executive, detailed by my Brother DOUGLAS, need not be repeated here. My concern is with the narrow scope accorded the Speech or Debate Clause by today's decision. I fully agree with the Court that a Congressman's immunity under the Clause must also be extended to his aides if it is to be at all effective. The complexities and press of congressional business make it impossible for a Member to function without the close cooperation of his legislative assistants. Their role as his agents in the performance of official duties requires that they share his immunity for those acts. The scope of that immunity, however, is as important as the persons to whom it extends. In my view, today's decision so restricts the privilege of speech or debate as to endanger the continued performance of legislative tasks that are vital to the workings of our democratic system.

[13] It is conceded that all of the material which Beacon Press has undertaken to publish was introduced into the Subcommittee record and that this record is open to the public. See Brief for United States 3.

I

In holding that Senator Gravel's alleged arrangement with Beacon Press to publish the Pentagon Papers is not shielded from extra-senatorial inquiry by the Speech or Debate Clause, the Court adopts what for me is a far too narrow view of the legislative function. The Court seems to assume that words spoken in debate or written in congressional reports are protected by the Clause, so that if Senator Gravel had recited part of the Pentagon Papers on the Senate floor or copied them into a Senate report, those acts could not be questioned "in any other Place." Yet because he sought a wider audience, to publicize information deemed relevant to matters pending before his own committee, the Senator suddenly loses his immunity and is exposed to grand jury investigation and possible prosecution for the republication. The explanation for this anomalous result is the Court's belief that "Speech or Debate" encompasses only acts necessary to the internal deliberations of Congress concerning proposed legislation. "Here," according to the Court, "private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the Senate." *Ante*, at 625. Therefore, "the Senator's arrangements with Beacon Press were not part and parcel of the legislative process." *Id.*, at 626.

Thus, the Court excludes from the sphere of protected legislative activity a function that I had supposed lay at the heart of our democratic system. I speak, of course, of the legislator's duty to inform the public about matters affecting the administration of government. That this "informing function" falls into the class of things "generally done in a session of the House by one of its members in relation to the business before it," *Kilbourn* v. *Thompson*, 103 U. S. 168, 204 (1881), was explicitly acknowledged by the Court in *Watkins*

v. *United States*, 354 U. S. 178 (1957). In speaking of the "power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government," the Court noted that "[f]rom the earliest times in its history, the Congress has assiduously performed an 'informing function' of this nature." *Id.*, at 200 n. 33.

We need look no further than Congress itself to find evidence supporting the Court's observation in *Watkins*. Congress has provided financial support for communications between its Members and the public, including the franking privilege for letters, telephone and telegraph allowances, stationery allotments, and favorable prices on reprints from the Congressional Record. Congressional hearings, moreover, are not confined to gathering information for internal distribution, but are often widely publicized, sometimes televised, as a means of alerting the electorate to matters of public import and concern. The list is virtually endless, but a small sampling of contemporaneous hearings of this kind would certainly include the Kefauver hearings on organized crime, the 1966 hearings on automobile safety, and the numerous hearings of the Senate Foreign Relations Committee on the origins and conduct of the war in Vietnam. In short, there can be little doubt that informing the electorate is a thing "generally done" by the Members of Congress "in relation to the business before it."

The informing function has been cited by numerous students of American politics, both within and without the Government, as among the most important responsibilities of legislative office. Woodrow Wilson, for example, emphasized its role in preserving the separation of powers by ensuring that the administration of public policy by the Executive is understood by the legislature and electorate:

> "It is the proper duty of a representative body to look diligently into every affair of government

> and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct." Congressional Government 303 (1885).

Others have viewed the give-and-take of such communication as an important means of educating both the legislator and his constituents:

> "With the decline of Congress as an original source of legislation, this function of keeping the government in touch with public opinion and of keeping public opinion in touch with the conduct of the government becomes increasingly important. Congress no longer governs the country; the Administration in all its ramifications actually governs. But Congress serves as a forum through which public opinion can be expressed, general policy discussed, and the conduct of governmental affairs exposed and criticized." The Reorganization of Congress, A Report of the Committee on Congress of the American Political Science Association 14 (1945).

Though I fully share these and related views on the educational values served by the informing function, there is yet another, and perhaps more fundamental, interest at stake. It requires no citation of authority to state that public concern over current issues—the war, race relations, governmental invasions of privacy—

has transformed itself in recent years into what many believe is a crisis of confidence, in our system of government and its capacity to meet the needs and reflect the wants of the American people. Communication between Congress and the electorate tends to alleviate that doubt by exposing and clarifying the workings of the political system, the policies underlying new laws and the role of the Executive in their administration. To the extent that the informing function succeeds in fostering public faith in the responsiveness of Government, it is not only an "ordinary" task of the legislator but one that is essential to the continued vitality of our democratic institutions.

Unlike the Court, therefore, I think that the activities of Congressmen in communicating with the public are legislative acts protected by the Speech or Debate Clause. I agree with the Court that not every task performed by a legislator is privileged; intervention before Executive departments is one that is not. But the informing function carries a far more persuasive claim to the protections of the Clause. It has been recognized by this Court as something "generally done" by Congressmen, the Congress itself has established special concessions designed to lower the cost of such communication, and, most important, the function furthers several well-recognized goals of representative government. To say in the face of these facts that the informing function is not privileged merely because it is not necessary to the internal deliberations of Congress is to give the Speech or Debate Clause an artificial and narrow reading unsupported by reason.

Nor can it be supported by history. There is substantial evidence that the Framers intended the Speech or Debate Clause to cover all communications from a Congressman to his constituents. Thomas Jefferson clearly expressed that view of legislative privilege in a

case involving Samuel Cabell, Congressman from Virginia. In 1797 a federal grand jury in Virginia investigated the conduct of several Congressmen, including Cabell, in sending newsletters to constituents critical of the administration's policy in the war with France. The grand jury found that the Congressmen had endeavored "at a time of real public danger, to disseminate unfounded calumnies against the happy government of the United States, and thereby to separate the people therefrom; and to increase or produce a foreign influence, ruinous to the peace, happiness, and independence of these United States." Jefferson immediately drafted a long essay signed by himself and several citizens of Cabell's district, condemning the grand jury investigation as a blatant violation of the congressional privilege. Revised and joined by James Madison, the protest was forwarded to the Virginia House of Delegates. It reads in part as follows:

> "[T]hat in order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the co-ordinate branches, Judiciary and Executive; and that their communications with their constituents should of right, as of duty also, be free, full, and unawed by any: that so necessary has this intercourse been deemed in the country from which they derive principally their descent and laws, that the correspondence between the representative and constituent is privileged there to pass free of expense through the channel of the public post, and that the proceedings of the legislature have been known to be arrested and suspended at times until the Representa-

tives could go home to their several counties and confer with their constituents.

. . . . .

"That when circumstances required that the ancient confederation of this with the sister States, for the government of their common concerns, should be improved into a more regular and effective form of general government, the same representative principle was preserved in the new legislature, one branch of which was to be chosen directly by the citizens of each State, and the laws and principles remained unaltered which privileged the representative functions, whether to be exercised in the State or General Government, against the cognizance and notice of the co-ordinate branches, Executive and Judiciary; and for its safe and convenient exercise, the intercommunication of the representative and constituent has been sanctioned and provided for through the channel of the public post, at the public expense.

. . . . .

"That the grand jury is a part of the Judiciary, not permanent indeed, but in office, *pro hac vice* and responsible as other judges are for their actings and doings while in office: that for the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties towards each other, to overawe the free correspondence which exists and ought to exist between them, to dictate what communications may pass between them, and to punish all others, to put the representative into jeopardy of criminal prosecution, of vexation, expense, and punishment before the Judiciary, if his communications, public or private, do not exactly square with their ideas of fact or right, or with their designs of wrong, is to put the legislative de-

> partment under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation, which requires essentially that the representative be as free as his constituents would be, that the same interchange of sentiment be lawful between him and them as would be lawful among themselves were they in the personal transaction of their own business; is to do away the influence of the people over the proceedings of their representatives by excluding from their knowledge, by the terror of punishment, all but such information or misinformation as may suit their own views; and is the more vitally dangerous when it is considered that grand jurors are selected by officers nominated and holding their places at the will of the Executive . . . ; and finally, is to give to the Judiciary, and through them to the Executive, a complete preponderance over the legislature rendering ineffectual that wise and cautious distribution of powers made by the constitution between the three branches, and subordinating to the other two that branch which most immediately depends on the people themselves, and is responsible to them at short periods." 8 The Works of Thomas Jefferson 322–327 (Ford ed. 1904).

Jefferson's protest is perhaps the most significant and certainly the most cogent analysis of the privileged nature of communication between Congressman and public. Its comments on the history, purpose, and scope of the Clause leave no room for the notion that the Executive or Judiciary can in any way question the contents of that dialogue. Nor was Jefferson alone among the Framers in that view. Aside from Madison, who joined in the protest, James Wilson took the position that a member of Congress "should enjoy the fullest liberty of speech, and . . . should be protected from

the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." 1 Works of James Wilson 421 (R. McCloskey ed. 1967). Wilson, a member of the Committee responsible for drafting the Speech or Debate Clause, stated in plainest terms his belief in the duty of Congressmen to inform the people about proceedings in the Congress:

> "That the conduct and proceedings of representatives should be as open as possible to the inspection of those whom they represent, seems to be, in republican government, a maxim, of whose truth or importance the smallest doubt cannot be entertained. That, by a necessary consequence, every measure, which will facilitate or secure this open communication of the exercise of delegated power, should be adopted and patronised by the constitution and laws of every free state, seems to be another maxim, which is the unavoidable result of the former." *Id.*, at 422.

Wilson's statements, like those of Jefferson and Madison, reflect a deep conviction of the Framers, that self-government can succeed only when the people are informed by their representatives, without interference by the Executive or Judiciary, concerning the conduct of their agents in government. That conviction is no less valid today than it was at the time of our founding. I would honor the clear intent of the Framers and extend to the informing function the protections embodied in the Speech or Debate Clause.

The Court, however, offers not a shred of evidence concerning the Framers' intent, but relies instead on the English view of legislative privilege to support its interpretation of the Clause. Like the Court itself, *ante*, at 623–624, n. 14, I have some doubt concerning the relevance of English authority to this case, particularly authority post-dating the adoption of our Constitution. But

in any event it is plain that the Court has misread the history on which it relies. The Speech or Debate Clause of the English Bill of Rights was at least in part the product of a struggle between Parliament and Crown over the very type of activity involved in this litigation. During the reign of Charles II, the House of Commons received a number of reports about an alleged plot between the Crown and the King of France to restore Catholicism as the established religion of England. The most famous of these reports, Dangerfield's Narrative, was entered into the Commons Journal and then republished by order of the Speaker of the House, Sir William Williams, with the consent of Commons. In 1686, after James II came to the throne, informations charging libel were filed against Williams in King's Bench. Despite the arguments of his attorney, Sir Robert Atkyns, that the publication was necessary to the "counselling" and "enquiring" functions of Parliament, Williams' plea of privilege was rejected and he was fined £10,000. Shortly after Williams' conviction James II was sent into exile, and a committee was appointed by the House of Commons to report upon "such things as are absolutely necessary for securing the Laws and Liberties of the Nation." 9 Debates of the House of Commons, coll. by A. Grey, 1763, p. 37. In reporting to the House, the chairman of the committee stated that the provision for freedom of speech and debate was included "for the sake of one . . . Sir William Williams, who was punished out of Parliament for what he had done in Parliament." *Id.*, at 81. Following consultation with the House of Lords, that provision was included as part of the English Bill of Rights, and the judgment against Williams was declared by Commons "illegal and subversive of the freedom of parliament." 1 W. Townsend, Memoirs of the House of Commons 414 (2d ed. 1844).

Although the origins of the Speech or Debate Clause in

England can thus be traced to a case involving republication, the Court, citing *Stockdale* v. *Hansard,* 9 Ad. & E. 1, 112 Eng. Rep. 1112 (K. B. 1839), says that "English legislative privilege was not viewed as protecting republication of an otherwise immune libel on the floor of the House." *Ante,* at 622. That conclusion reflects an erroneous reading of precedent. *Stockdale* did state that "if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher." *Id.,* at 114, 112 Eng. Rep., at 1156. But *Stockdale* concerned only the publisher's liability, not that of a member of Parliament; thus, it has little bearing on the instant case. Furthermore, contrary to the Court's assertion, *ante,* at 623–624, n. 14, even the narrow result of *Stockdale* was repudiated 30 years later in *Wason* v. *Walter,* L. R. 4 Q. B. 73 (1868), for reasons strikingly similar to those expressed by Jefferson in his protest.[1] In

[1] In *Wason* the proprietor of the London Times was sued for printing an account of a libelous debate in the House of Lords. The court agreed with *Stockdale* that the House did not have final authority to determine the scope of its privileges and thus could not confer immunity on any publisher merely by ordering a document printed and then declaring it privileged. Indeed, the *Wason* court gave its "unhesitating and unqualified adhesion" to *Stockdale* on that point. *Id.,* at 86. The only issue for the court, therefore, was whether the publication "is, independently of such order or assertion of privilege, in itself privileged and lawful." *Id.,* at 87. On that issue the court severely criticized the reasoning of earlier cases, including *Stockdale,* stating that two of the Justices in that case had expressed a "very shortsighted view of the subject." *Id.,* at 91. The court held that so long as the republication was accurate and in good faith, it could not be the basis of a libel action; and the member himself was privileged to publish his speech "for the information of his constituents." *Id.,* at 95. Relying, not on the Parliamentary Papers Act of 1840, which was enacted in response to *Stockdale,* but on the analogy to judicial reports and the need for an informed public, the court stated:

"It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the houses of par-

my view, therefore, the English precedent, if relevant at all, supports Senator Gravel's position here.

Thus, from the standpoint of function or history, it is plain that Senator Gravel's dissemination of material,

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liament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done, the welfare of the community depends. Where would be our confidence in the government of the country or in the legislature by which our laws are framed, and to whose charge the great interests of the country are committed,—where would be our attachment to the constitution under which we live,—if the proceedings of the great council of the realm were shrouded in secresy and concealed from the knowledge of the nation? How could the communications between the representatives of the people and their constituents, which are so essential to the working of the representative system, be usefully carried on, if the constituencies were kept in ignorance of what their representatives are doing? What would become of the right of petitioning on all measures pending in parliament, the undoubted right of the subject, if the people are to be kept in ignorance of what is passing in either house? Can any man bring himself to doubt that the publicity given in modern times to what passes in parliament is essential to the maintenance of the relations subsisting between the government, the legislature, and the country at large?" *Id.*, at 89.

The fact that the debate was published in violation of a standing order of Parliament was held to be irrelevant. "Independently of the orders of the houses, there is nothing unlawful in publishing reports of parliamentary proceedings. . . . [A]ny publication of its debates made in contravention of its orders would be a matter between the house and the publisher." *Id.*, at 95.

Whether *Wason* was based on parliamentary privilege or on an analogy to the publication of judicial proceedings is unimportant. What is important to the instant litigation is that *Wason* firmly rejected any implication in *Stockdale* that the informing function was not among the legislative activities that a member of Parliament was privileged to perform. Indeed, that same conclusion was reached by Sir Gilbert Campion, a noted scholar, in his memorandum to the House of Commons' Select Committee on the Official Secrets Acts. After reviewing the republication cases through *Wason*, the memorandum concluded:

"If . . . a member circulated among his constituents a speech made

placed by him in the record of a congressional hearing, is itself legislative activity protected by the privilege of speech or debate. Whether or not that privilege protects the publisher from prosecution or the Senator from senatorial discipline, it certainly shields the Senator from any grand jury inquiry about his part in the publication. As we held in *United States* v. *Johnson*, 383 U. S. 169 (1966), neither a Congressman, nor his aides, nor third parties may be made to testify concerning privileged acts or their motives. That immunity, which protects legislators "from deterrents to the uninhibited discharge of their legislative duty," *Tenney* v. *Brandhove*, 341 U. S. 367, 377 (1951), is the essence of the Clause, designed not for the legislators' "private indulgence but for the public good." *Id.*, at 377.

That privilege, moreover, may not be defeated merely because a court finds that the publication was irregular or the material irrelevant to legislative business. Legislative immunity secures "to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office . . . whether the exercise was regular according to the rules of the house, or irregular and against their rules." *Coffin* v. *Coffin*, 4 Mass. 1, 27 (1808). Thus, if the republication of this committee record was unauthorized or even prohibited by the Senate rules, it

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by him in Parliament in which he had disclosed information [otherwise subject to the Official Secrets Acts], it might be held on the analogy of the principles which have been said to apply to prosecutions for libel that he could not be proceeded against for disclosing it to his constituents, unless, of course, the speech had been made in a secret session. Even if the suggested analogy is not admitted, it would be repugnant to common sense to hold that though the original disclosure in the House was protected by parliamentary privilege, the circulation of the speech among the member's constituents was not." Minutes of Evidence Taken before the Select Committee on the Official Secrets Acts 29 (1939).

is up to the Senate, not the Executive or Judiciary, to fashion the appropriate sanction to discipline Senator Gravel.

Similarly, the Government cannot strip Senator Gravel of the immunity by asserting that his conduct "did not relate to any pending Congressional business." Brief for United States 41. The Senator has stated that his hearing on the Pentagon Papers had a direct bearing on the work of his Subcommittee on Buildings and Grounds, because of the effect of the Vietnam war on the domestic economy and the lack of sufficient federal funds to provide adequate public facilities. If in fact the Senator is wrong in this contention, and his conduct at the hearing exceeded the subcommittee's jurisdiction, then again it is the Senate that must call him to task. This Court has permitted congressional witnesses to defend their refusal to answer questions on the ground of nongermaneness. *Watkins* v. *United States*, 354 U. S. 178 (1957). Here, however, it is the Executive that seeks the aid of the judiciary, not to protect individual rights, but to extend its power of inquiry and interrogation into the privileged domain of the legislature. In my view the Court should refuse to turn the freedom of speech or debate on the Government's notions of legislative propriety and relevance. We would weaken the very structure of our constitutional system by becoming a partner in this assault on the separation of powers.

Whether the Speech or Debate Clause extends to the informing function is an issue whose importance goes beyond the fate of a single Senator or Congressman. What is at stake is the right of an elected representative to inform, and the public to be informed, about matters relating directly to the workings of our Government. The dialogue between Congress and people has been recognized, from the days of our founding, as one of the necessary elements of a representative system.

We should not retreat from that view merely because, in the course of that dialogue, information may be revealed that is embarrassing to the other branches of government or violates their notions of necessary secrecy. A Member of Congress who exceeds the bounds of propriety in performing this official task may be called to answer by the other Members of his chamber. We do violence to the fundamental concepts of privilege, however, when we subject that same conduct to judicial scrutiny at the instance of the Executive.[2] The threat of "prosecution by an unfriendly executive and conviction by a hostile judiciary," *United States* v. *Johnson*, 383 U. S., at 179, that the Clause was designed to avoid, can only lead to timidity in the performance of this vital function. The Nation as a whole benefits from the congressional investigation and exposure of official corruption and deceit. It likewise suffers when that exposure is replaced by muted criticism, carefully hushed behind congressional walls.

II

Equally troubling in today's decision is the Court's refusal to bar grand jury inquiry into the source of documents received by the Senator and placed by him in the hearing record. The receipt of materials for use in a congressional hearing is an integral part of the preparation for that legislative act. In *United States* v. *Johnson, supra,* the Court acknowledged the privileged nature of such preparatory steps, holding that they, like the act itself and its motives, must be shielded from scrutiny by the Executive and Judiciary. That holding merely recognized the obvious—that speeches,

[2] Different considerations may apply, of course, where the republication is attacked, not by the Executive, but by private persons seeking judicial redress for an alleged invasion of their constitutional rights.

hearings, and the casting of votes require study and planning in advance. It would accomplish little toward the goal of legislative freedom to exempt an official act from intimidating scrutiny, if other conduct leading up to the act and intimately related to it could be deterred by a similar threat. The reasoning that guided that Court in *Johnson* is no less persuasive today, and I see no basis, nor does the Court offer any, for departing from it here. I would hold that Senator Gravel's receipt of the Pentagon Papers, including the name of the person from whom he received them, may not be the subject of inquiry by the grand jury.

I would go further, however, and also exclude from grand jury inquiry any knowledge that the Senator or his aides might have concerning how the source himself first came to possess the Papers. This immunity, it seems to me, is essential to the performance of the informing function. Corrupt and deceitful officers of government do not often post for public examination the evidence of their own misdeeds. That evidence must be ferreted out, and often is, by fellow employees and subordinates. Their willingness to reveal that information and spark congressional inquiry may well depend on assurances from their contact in Congress that their identities and means of obtaining the evidence will be held in strictest confidence. To permit the grand jury to frustrate that expectation through an inquiry of the Congressman and his aides can only dampen the flow of information to the Congress and thus to the American people. There is a similar risk, of course, when the Member's own House requires him to break the confidence. But the danger, it seems to me, is far less if the Member's colleagues, and not an "unfriendly executive" or "hostile judiciary," are charged with evaluating the propriety of his conduct. In any event, assuming that a Congressman can be required to reveal the

sources of his information and the methods used to obtain that information, that power of inquiry, as required by the Clause, is that of the Congressman's House, and of that House only.

I respectfully dissent.

Syllabus

BRANZBURG *v.* HAYES ET AL., JUDGES

CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

No. 70–85. Argued February 23, 1972—Decided June 29, 1972*

The First Amendment does not relieve a newspaper reporter of the obligation that all citizens have to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, and therefore the Amendment does not afford him a constitutional testimonial privilege for an agreement he makes to conceal facts relevant to a grand jury's investigation of a crime or to conceal the criminal conduct of his source or evidence thereof. Pp. 679–709.

No. 70–85, 461 S. W. 2d 345, and Kentucky Court of Appeals judgment in unreported case of *Branzburg* v. *Meigs;* and No. 70–94, 358 Mass. 604, 266 N. E. 2d 297, affirmed; No. 70–57, 434 F. 2d 1081, reversed.

WHITE, J., wrote the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 709. DOUGLAS, J., filed a dissenting opinion, *post*, p. 711. STEWART, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 725.

Edgar A. Zingman argued the cause for petitioner in No. 70–85. With him on the briefs was *Robert C. Ewald.* *E. Barrett Prettyman, Jr.*, argued the cause for petitioner in No. 70–94. With him on the briefs was *William H. Carey.* *Solicitor General Griswold* argued the cause for the United States in No. 70–57. With him on the briefs were *Assistant Attorney General Wilson, Assistant Attorney General Petersen, William Bradford Reynolds, Beatrice Rosenberg,* and *Sidney M. Glazer.*

*Together with No. 70–94, *In re Pappas,* on certiorari to the Supreme Judicial Court of Massachusetts, also argued February 23, 1972, and No. 70–57, *United States* v. *Caldwell,* on certiorari to the United States Court of Appeals for the Ninth Circuit, argued February 22, 1972.

Edwin A. Schroering, Jr., argued the cause for respondents in No. 70–85. With him on the brief was *W. C. Fisher, Jr. Joseph J. Hurley*, First Assistant Attorney General, argued the cause for respondent, Commonwealth of Massachusetts, in No. 70–94. With him on the brief were *Robert H. Quinn*, Attorney General, *Walter H. Mayo III*, Assistant Attorney General, and *Lawrence T. Bench*, Deputy Assistant Attorney General. *Anthony G. Amsterdam* argued the cause for respondent in No. 70–57. With him on the brief were *Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston*, and *William Bennett Turner*.

William Bradford Reynolds argued the cause for the United States as *amicus curiae* urging affirmance in Nos. 70–85 and 70–94. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Wilson*, and *Beatrice Rosenberg*.

Briefs of *amici curiae* urging affirmance in No. 70–57 and reversal in Nos. 70–85 and 70–94 were filed by *Alexander M. Bickel, Lawrence J. McKay, Floyd Abrams, Daniel Sheehan, Corydon B. Dunham, Clarence J. Fried, Alan J. Hruska, Robert S. Rifkind, Anthony A. Dean*, and *Edward C. Wallace* for New York Times Co., Inc., et al.; by *Don H. Reuben, Lawrence Gunnels, Steven L. Bashwiner*, and *Thomas F. Ging* for Chicago Tribune Co.; by *Arthur B. Hanson* for the American Newspaper Publishers Association; and by *Irving Leuchter* for the American Newspaper Guild, AFL–CIO, CLC.

John T. Corrigan filed a brief for the National District Attorneys Association urging reversal in No. 70–57 and affirmance in No. 70–94.

Briefs of *amici curiae* urging affirmance in No. 70–57 were filed by *Irwin Karp* for the Authors League of America, Inc.; by *W. Theodore Pierson* and *J. Laurent*

Scharff for the Radio Television News Directors Association; and by *Earle K. Moore* and *Samuel Rabinove* for the Office of Communication of the United Church of Christ et al.

Briefs of *amici curiae* in No. 70–57 were filed by *Leo P. Larkin, Jr., Stanley Godofsky,* and *John J. Sheehy* for Washington Post Co. et al.; by *Richard M. Schmidt, Jr.,* for the American Society of Newspaper Editors et al.; by *Roger A. Clark* for the National Press Photographers Association, Inc.; and by *Melvin L. Wulf, Paul N. Halvonik, A. L. Wirin, Fred Okrand,* and *Lawrence R. Sperber* for the American Civil Liberties Union et al.

Opinion of the Court by MR. JUSTICE WHITE, announced by THE CHIEF JUSTICE.

The issue in these cases is whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment. We hold that it does not.

I

The writ of certiorari in No. 70–85, *Branzburg* v. *Hayes* and *Meigs,* brings before us two judgments of the Kentucky Court of Appeals, both involving petitioner Branzburg, a staff reporter for the Courier-Journal, a daily newspaper published in Louisville, Kentucky.

On November 15, 1969, the Courier-Journal carried a story under petitioner's by-line describing in detail his observations of two young residents of Jefferson County synthesizing hashish from marihuana, an activity which, they asserted, earned them about $5,000 in three weeks. The article included a photograph of a pair of hands working above a laboratory table on which was a substance identified by the caption as hashish. The article stated that petitioner had promised not to

reveal the identity of the two hashish makers.[1] Petitioner was shortly subpoenaed by the Jefferson County grand jury; he appeared, but refused to identify the individuals he had seen possessing marihuana or the persons he had seen making hashish from marihuana.[2] A state trial court judge[3] ordered petitioner to answer these questions and rejected his contention that the Kentucky reporters' privilege statute, Ky. Rev. Stat. § 421.100 (1962),[4] the First Amendment of the United States Constitution, or §§ 1, 2, and 8 of the Kentucky Constitution authorized his refusal to answer. Petitioner then sought prohibition and mandamus in the Kentucky Court of Appeals on the same grounds, but the Court of Appeals denied the petition. *Branzburg* v.

[1] The article contained the following paragraph: "'I don't know why I'm letting you do this story,' [one informant] said quietly. 'To make the narcs (narcotics detectives) mad, I guess. That's the main reason.' However, Larry and his partner asked for and received a promise that their names would be changed." App. 3–4.

[2] The Foreman of the grand jury reported that petitioner Branzburg had refused to answer the following two questions: "#1. On November 12, or 13, 1969, who was the person or persons you observed in possession of Marijuana, about which you wrote an article in the Courier-Journal on November 15, 1969? #2. On November 12, or 13, 1969, who was the person or persons you observed compounding Marijuana, producing same to a compound known as Hashish?" App. 6.

[3] Judge J. Miles Pound. The respondent in this case, Hon. John P. Hayes, is the successor of Judge Pound.

[4] Ky. Rev. Stat. § 421.100 provides:

"No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected."

Pound, 461 S. W. 2d 345 (1970), as modified on denial of rehearing, Jan. 22, 1971. It held that petitioner had abandoned his First Amendment argument in a supplemental memorandum he had filed and tacitly rejected his argument based on the Kentucky Constitution. It also construed Ky. Rev. Stat. § 421.100 as affording a newsman the privilege of refusing to divulge the identity of an informant who supplied him with information, but held that the statute did not permit a reporter to refuse to testify about events he had observed personally, including the identities of those persons he had observed.

The second case involving petitioner Branzburg arose out of his later story published on January 10, 1971, which described in detail the use of drugs in Frankfort, Kentucky. The article reported that in order to provide a comprehensive survey of the "drug scene" in Frankfort, petitioner had "spent two weeks interviewing several dozen drug users in the capital city" and had seen some of them smoking marihuana. A number of conversations with and observations of several unnamed drug users were recounted. Subpoenaed to appear before a Franklin County grand jury "to testify in the matter of violation of statutes concerning use and sale of drugs," petitioner Branzburg moved to quash the summons; [5] the motion was denied, al-

[5] Petitioner's Motion to Quash argued:

"If Mr. Branzburg were required to disclose these confidences to the Grand Jury, or any other person, he would thereby destroy the relationship of trust which he presently enjoys with those in the drug culture. They would refuse to speak to him; they would become even more reluctant than they are now to speak to any newsman; and the news media would thereby be vitally hampered in their ability to cover the views and activities of those involved in the drug culture.

"The inevitable effect of the subpoena issued to Mr. Branzburg, if it not be quashed by this Court, will be to suppress

though an order was issued protecting Branzburg from revealing "confidential associations, sources or information" but requiring that he "answer any questions which concern or pertain to any criminal act, the commission of which was actually observed by [him]." Prior to the time he was slated to appear before the grand jury, petitioner sought mandamus and prohibition from the Kentucky Court of Appeals, arguing that if he were forced to go before the grand jury or to answer questions regarding the identity of informants or disclose information given to him in confidence, his effectiveness as a reporter would be greatly damaged. The Court of Appeals once again denied the requested writs, reaffirming its construction of Ky. Rev. Stat. § 421.100, and rejecting petitioner's claim of a First Amendment privilege. It distinguished *Caldwell* v. *United States*, 434 F. 2d 1081 (CA9 1970), and it also announced its "misgivings" about that decision, asserting that it represented "a drastic departure from the generally recognized rule that the sources of information of a newspaper reporter are not privileged under the First Amendment." It characterized petitioner's fear that his ability to obtain

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vital First Amendment freedoms of Mr. Branzburg, of the Courier-Journal, of the news media, and of those involved in the drug culture by driving a wedge of distrust and silence between the news media and the drug culture. This Court should not sanction a use of its process entailing so drastic an incursion upon First Amendment freedoms in the absence of compelling Commonwealth interest in requiring Mr. Branzburg's appearance before the Grand Jury. It is insufficient merely to protect Mr. Branzburg's right to silence after he appears before the Grand Jury. This Court should totally excuse Mr. Branzburg from responding to the subpoena and even entering the Grand Jury room. Once Mr. Branzburg is required to go behind the closed doors of the Grand Jury room, his effectiveness as a reporter in these areas is totally destroyed. The secrecy that surrounds Grand Jury testimony necessarily introduces uncertainties in the minds of those who fear a betrayal of their confidences." App. 43–44.

news would be destroyed as "so tenuous that it does not, in the opinion of this court, present an issue of abridgement of the freedom of the press within the meaning of that term as used in the Constitution of the United States."

Petitioner sought a writ of certiorari to review both judgments of the Kentucky Court of Appeals, and we granted the writ.[6] 402 U. S. 942 (1971).

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[6] After the Kentucky Court of Appeals' decision in *Branzburg* v. *Meigs* was announced, petitioner filed a rehearing motion in *Branzburg* v. *Pound* suggesting that the court had not passed upon his First Amendment argument and calling to the court's attention the recent Ninth Circuit decision in *Caldwell* v. *United States*, 434 F. 2d 1081 (1970). On Jan. 22, 1971, the court denied petitioner's motion and filed an amended opinion in the case, adding a footnote, 461 S. W. 2d 345, 346 n. 1, to indicate that petitioner had abandoned his First Amendment argument and elected to rely wholly on Ky. Rev. Stat. § 421.100 when he filed a Supplemental Memorandum before oral argument. In his Petition for Prohibition and Mandamus, petitioner had clearly relied on the First Amendment, and he had filed his Supplemental Memorandum in response to the State's Memorandum in Opposition to the granting of the writs. As its title indicates, this Memorandum was complementary to petitioner's earlier Petition, and it dealt primarily with the State's construction of the phrase "source of any information" in Ky. Rev. Stat. § 421.100. The passage that the Kentucky Court of Appeals cited to indicate abandonment of petitioner's First Amendment claim is as follows:

"Thus, the controversy continues as to whether a newsman's source of information should be privileged. However, that question is not before the Court in this case. The Legislature of Kentucky has settled the issue, having decided that a newsman's source of information is to be privileged. Because of this there is no point in citing Professor Wigmore and other authorities who speak against the grant of such a privilege. The question has been many times debated, and the Legislature has spoken. The only question before the Court is the construction of the term 'source of information' as it was intended by the Legislature."

Though the passage itself is somewhat unclear, the surrounding discussion indicates that petitioner was asserting here that the ques-

In re Pappas, No. 70–94, originated when petitioner Pappas, a television newsman-photographer working out of the Providence, Rhode Island, office of a New Bedford, Massachusetts, television station, was called to New Bedford on July 30, 1970, to report on civil disorders there which involved fires and other turmoil. He intended to cover a Black Panther news conference at that group's headquarters in a boarded-up store. Petitioner found the streets around the store barricaded, but he ultimately gained entrance to the area and recorded and photographed a prepared statement read by one of the Black Panther leaders at about 3 p. m.[7] He then asked for and received permission to reenter the area. Returning at about 9 o'clock, he was allowed to enter and remain inside Panther headquarters. As a condition of entry, Pappas agreed not to disclose anything he saw or heard inside the store except an anticipated police raid, which Pappas, "on his own," was free to photograph and report as he wished. Pappas stayed inside the headquarters for about three hours, but there was no police raid, and petitioner wrote no story and did not otherwise reveal what had occurred in the store while he was there. Two months later, petitioner was summoned before the Bristol

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tion of whether a common-law privilege should be recognized was irrelevant since the legislature had already enacted a statute. In his earlier discussion, petitioner had analyzed certain cases in which the First Amendment argument was made but indicated that it was not necessary to reach this question if the statutory phrase "source of any information" were interpreted expansively. We do not interpret this discussion as indicating that petitioner was abandoning his First Amendment claim if the Kentucky Court of Appeals did not agree with his statutory interpretation argument, and we hold that the constitutional question in *Branzburg* v. *Pound* was properly preserved for review.

[7] Petitioner's news films of this event were made available to the Bristol County District Attorney. App. 4.

County Grand Jury and appeared, answered questions as to his name, address, employment, and what he had seen and heard outside Panther headquarters, but refused to answer any questions about what had taken place inside headquarters while he was there, claiming that the First Amendment afforded him a privilege to protect confidential informants and their information. A second summons was then served upon him, again directing him to appear before the grand jury and "to give such evidence as he knows relating to any matters which may be inquired of on behalf of the Commonwealth before . . . the Grand Jury." His motion to quash on First Amendment and other grounds was denied by the trial judge who, noting the absence of a statutory newsman's privilege in Massachusetts, ruled that petitioner had no constitutional privilege to refuse to divulge to the grand jury what he had seen and heard, including the identity of persons he had observed. The case was reported for decision to the Supreme Judicial Court of Massachusetts.[8] The record there did not include a transcript of the hearing on the motion to quash, nor did it reveal the specific questions petitioner had refused to answer, the expected nature of his testimony, the nature of the grand jury investigation, or the likelihood of the grand jury's securing the information it sought from petitioner by other means.[9] The

[8] The case was reported by the superior court directly to the Supreme Judicial Court for an interlocutory ruling under Mass. Gen. Laws, c. 278, § 30A and Mass. Gen. Laws, c. 231, § 111 (1959). The Supreme Judicial Court's decision appears at 358 Mass. 604, 266 N. E. 2d 297 (1971).

[9] "We do not have before us the text of any specific questions which Pappas has refused to answer before the grand jury, or any petition to hold him for contempt for his refusal. We have only general statements concerning (a) the inquiries of the grand jury, and (b) the materiality of the testimony sought from Pappas. The record does not show the expected nature of his testimony or what

Supreme Judicial Court, however, took "judicial notice that in July, 1970, there were serious civil disorders in New Bedford, which involved street barricades, exclusion of the public from certain streets, fires, and similar turmoil. We were told at the arguments that there was gunfire in certain streets. We assume that the grand jury investigation was an appropriate effort to discover and indict those responsible for criminal acts." 358 Mass. 604, 607, 266 N. E. 2d 297, 299 (1971). The court then reaffirmed prior Massachusetts holdings that testimonial privileges were "exceptional" and "limited," stating that "[t]he principle that the public 'has a right to every man's evidence' " had usually been preferred, in the Commonwealth, to countervailing interests. *Ibid.* The court rejected the holding of the Ninth Circuit in *Caldwell* v. *United States, supra,* and "adhere[d] to the view that there exists no constitutional newsman's privilege, either qualified or absolute, to refuse to appear and testify before a court or grand jury." [10] 358 Mass., at 612, 266 N. E. 2d, at 302–303. Any adverse effect upon the free dissemination of news by virtue of petitioner's being called to testify was deemed to be only "indirect, theoretical, and uncertain." *Id.,* at 612, 266 N. E. 2d, at 302. The court concluded that "[t]he obligation of newsmen . . . is that of every citizen . . . to appear when summoned, with relevant written or other material when required, and to answer relevant and reasonable inquiries." *Id.,* at 612, 266 N. E. 2d, at 303. The court nevertheless noted that grand juries were subject to supervision by the presid-

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likelihood there is of being able to obtain that testimony from persons other than news gatherers." 358 Mass., at 606–607, 266 N. E. 2d, at 299 (footnote omitted).

[10] The court expressly declined to consider, however, appearances of newsmen before legislative or administrative bodies. *Id.,* at 612 n. 10, 266 N. E. 2d, at 303 n. 10.

ing judge, who had the duty "to prevent oppressive, unnecessary, irrelevant, and other improper inquiry and investigation," *ibid.*, to insure that a witness' Fifth Amendment rights were not infringed, and to assess the propriety, necessity, and pertinence of the probable testimony to the investigation in progress.[11] The burden was deemed to be on the witness to establish the impropriety of the summons or the questions asked. The denial of the motion to quash was affirmed and we granted a writ of certiorari to petitioner Pappas. 402 U. S. 942 (1971).

United States v. *Caldwell*, No. 70–57, arose from subpoenas issued by a federal grand jury in the Northern District of California to respondent Earl Caldwell, a reporter for the New York Times assigned to cover the Black Panther Party and other black militant groups. A subpoena *duces tecum* was served on respondent on February 2, 1970, ordering him to appear before the grand jury to testify and to bring with him notes and tape recordings of interviews given him for publication by officers and spokesmen of the Black Panther Party concerning the aims, purposes, and activities of that organization.[12] Respondent objected to the scope

[11] The court noted that "a presiding judge may consider in his discretion" the argument that the use of newsmen as witnesses is likely to result in unnecessary or burdensome use of their work product, *id.*, at 614 n. 13, 266 N. E. 2d, at 304 n. 13, and cautioned that: "We do not suggest that a general investigation of mere political or group association of persons, without substantial relation to criminal events, may not be viewed by a judge in a somewhat different manner from an investigation of particular criminal events concerning which a newsman may have knowledge." *Id.*, at 614 n. 14, 266 N. E. 2d, at 304 n. 14.

[12] The subpoena ordered production of "[n]otes and tape recordings of interviews covering the period from January 1, 1969, to date, reflecting statements made for publication by officers and spokesmen for the Black Panther Party concerning the aims and purposes

of this subpoena, and an agreement between his counsel and the Government attorneys resulted in a continuance. A second subpoena, served on March 16, omitted the documentary requirement and simply ordered Caldwell "to appear . . . to testify before the Grand Jury." Respondent and his employer, the New York Times,[13] moved to quash on the ground that the unlimited breadth of the subpoenas and the fact that Caldwell would have to appear in secret before the grand jury would destroy his working relationship with the Black Panther Party and "suppress vital First Amendment freedoms . . . by driving a wedge of distrust and silence between the news media and the militants." App. 7. Respondent argued that "so drastic an incursion upon First Amendment freedoms" should not be permitted "in the absence of a compelling governmental interest—not shown here—in requiring Mr. Caldwell's appearance before the grand jury." *Ibid.* The motion was supported by *amicus curiae* memoranda from other publishing concerns and by affidavits from newsmen asserting the unfavorable impact on news sources of requiring reporters to appear before grand juries. The Government filed three memoranda in opposition to the motion to quash, each supported by affidavits. These documents stated that the grand jury was investigating, among other things, possible violations of a number of criminal statutes, including 18 U. S. C. § 871 (threats against the President), 18 U. S. C.

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of said organization and the activities of said organization, its officers, staff, personnel, and members, including specifically but not limited to interviews given by David Hilliard and Raymond 'Masai' Hewitt." App. 20.

[13] The New York Times was granted standing to intervene as a party on the motion to quash the subpoenas. *Application of Caldwell*, 311 F. Supp. 358, 359 (ND Cal. 1970). It did not file an appeal from the District Court's contempt citation, and it did not seek certiorari here. It has filed an *amicus curiae* brief, however.

§ 1751 (assassination, attempts to assassinate, conspiracy to assassinate the President), 18 U. S. C. § 231 (civil disorders), 18 U. S. C. § 2101 (interstate travel to incite a riot), and 18 U. S. C. § 1341 (mail frauds and swindles). It was recited that on November 15, 1969, an officer of the Black Panther Party made a publicly televised speech in which he had declared that "[w]e will kill Richard Nixon" and that this threat had been repeated in three subsequent issues of the Party newspaper. App. 66, 77. Also referred to were various writings by Caldwell about the Black Panther Party, including an article published in the New York Times on December 14, 1969, stating that "[i]n their role as the vanguard in a revolutionary struggle the Panthers have picked up guns," and quoting the Chief of Staff of the Party as declaring: "We advocate the very direct overthrow of the Government by way of force and violence. By picking up guns and moving against it because we recognize it as being oppressive and in recognizing that we know that the only solution to it is armed struggle [*sic*]." App. 62. The Government also stated that the Chief of Staff of the Party had been indicted by the grand jury on December 3, 1969, for uttering threats against the life of the President in violation of 18 U. S. C. § 871 and that various efforts had been made to secure evidence of crimes under investigation through the immunization of persons allegedly associated with the Black Panther Party.

On April 6, the District Court denied the motion to quash, *Application of Caldwell*, 311 F. Supp. 358 (ND Cal. 1970), on the ground that "*every person* within the jurisdiction of the government" is bound to testify upon being properly summoned. *Id.*, at 360 (emphasis in original). Nevertheless, the court accepted respondent's First Amendment arguments to the extent of issuing a protective order providing that although respondent had to di-

vulge whatever information had been given to him for publication, he "shall not be required to reveal confidential associations, sources or information received, developed or maintained by him as a professional journalist in the course of his efforts to gather news for dissemination to the public through the press or other news media." The court held that the First Amendment afforded respondent a privilege to refuse disclosure of such confidential information until there had been "a showing by the Government of a compelling and overriding national interest in requiring Mr. Caldwell's testimony which cannot be served by any alternative means." *Id.*, at 362.

Subsequently,[14] the term of the grand jury expired, a new grand jury was convened, and a new subpoena *ad testificandum* was issued and served on May 22, 1970. A new motion to quash by respondent and memorandum in opposition by the Government were filed, and, by stipulation of the parties, the motion was submitted on the prior record. The court denied the motion to quash, repeating the protective provisions in its prior order but this time directing Caldwell to appear before the grand jury pursuant to the May 22 subpoena. Respondent refused to appear before the grand jury, and the court issued an order to show cause why he should not be held in contempt. Upon his further refusal to go before the grand jury, respondent was ordered committed for contempt until such time as he complied with the court's order or until the expiration of the term of the grand jury.

[14] Respondent appealed from the District Court's April 6 denial of his motion to quash on April 17, 1970, and the Government moved to dismiss that appeal on the ground that the order was interlocutory. On May 12, 1970, the Ninth Circuit dismissed the appeal without opinion.

Respondent Caldwell appealed the contempt order,[15] and the Court of Appeals reversed. *Caldwell* v. *United States,* 434 F. 2d 1081 (CA9 1970). Viewing the issue before it as whether Caldwell was required to appear before the grand jury at all, rather than the scope of permissible interrogation, the court first determined that the First Amendment provided a qualified testimonial privilege to newsmen; in its view, requiring a reporter like Caldwell to testify would deter his informants from communicating with him in the future and would cause him to censor his writings in an effort to avoid being subpoenaed. Absent compelling reasons for requiring his testimony, he was held privileged to withhold it. The court also held, for similar First Amendment reasons, that, absent some special showing of necessity by the Government, attendance by Caldwell at a secret meeting of the grand jury was something he was privileged to refuse because of the potential impact of such an appearance on the flow of news to the public. We granted the United States' petition for certiorari.[16] 402 U. S. 942 (1971).

II

Petitioners Branzburg and Pappas and respondent Caldwell press First Amendment claims that may be simply put: that to gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; that if the reporter is nevertheless

[15] The Government did not file a cross-appeal and did not challenge the validity of the District Court protective order in the Court of Appeals.

[16] The petition presented a single question: "Whether a newspaper reporter who has published articles about an organization can, under the First Amendment, properly refuse to appear before a grand jury investigating possible crimes by members of that organization who have been quoted in the published articles."

forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment. Although the newsmen in these cases do not claim an absolute privilege against official interrogation in all circumstances, they assert that the reporter should not be forced either to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure. Principally relied upon are prior cases emphasizing the importance of the First Amendment guarantees to individual development and to our system of representative government,[17] decisions requiring that official action with adverse impact on First Amendment rights be justified by a public interest that is "compelling" or "paramount," [18] and those precedents establishing the principle that justifiable governmental goals may not be achieved by unduly broad means having an unnecessary impact

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[17] *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 145 (1967) (opinion of Harlan, J.); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964); *Talley* v. *California*, 362 U. S. 60, 64–65 (1960); *Bridges* v. *California*, 314 U. S. 252, 263 (1941); *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250 (1936); *Near* v. *Minnesota*, 283 U. S. 697, 722 (1931).

[18] *NAACP* v. *Button*, 371 U. S. 415, 439 (1963); *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945); *DeGregory* v. *Attorney General of New Hampshire*, 383 U. S. 825, 829 (1966); *Bates* v. *Little Rock*, 361 U. S. 516, 524 (1960); *Schneider* v. *State*, 308 U. S. 147, 161 (1939); *NAACP* v. *Alabama*, 357 U. S. 449, 464 (1958).

on protected rights of speech, press, or association.[19] The heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information.[20]

We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated. But these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from

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[19] *Freedman* v. *Maryland*, 380 U. S. 51, 56 (1965); *NAACP* v. *Alabama*, 377 U. S. 288, 307 (1964); *Martin* v. *City of Struthers*, 319 U. S. 141, 147 (1943); *Elfbrandt* v. *Russell*, 384 U. S. 11, 18 (1966).

[20] There has been a great deal of writing in recent years on the existence of a newsman's constitutional right of nondisclosure of confidential information. See, *e. g.*, Beaver, The Newsman's Code, The Claim of Privilege and Everyman's Right to Evidence, 47 Ore. L. Rev. 243 (1968); Guest & Stanzler, The Constitutional Argument for Newsmen Concealing Their Sources, 64 Nw. U. L. Rev. 18 (1969); Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L. J. 317 (1970); Comment, The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation, 58 Calif. L. Rev. 1198 (1970); Note, The Right of the Press to Gather Information, 71 Col. L. Rev. 838 (1971); Nelson, The Newsmen's Privilege Against Disclosure of Confidential Sources and Information, 24 Vand. L. Rev. 667 (1971).

any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.

The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime. Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence.[21] The claim is, however, that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future. This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them.

It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite

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[21] "In general, then, the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege.

". . . No pledge of privacy nor oath of secrecy can avail against demand for the truth in a court of justice." 8 J. Wigmore, Evidence § 2286 (McNaughton rev. 1961). This was not always the rule at common law, however. In 17th century England, the obligations of honor among gentlemen were occasionally recognized as privileging from compulsory disclosure information obtained in exchange for a promise of confidence. See *Bulstrod* v. *Letchmere*, 2 Freem. 6, 22 Eng. Rep. 1019 (1676); *Lord Grey's Trial*, 9 How. St. Tr. 127 (1682).

the possible burden that may be imposed. The Court has emphasized that "[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." *Associated Press* v. *NLRB,* 301 U. S. 103, 132–133 (1937). It was there held that the Associated Press, a news-gathering and disseminating organization, was not exempt from the requirements of the National Labor Relations Act. The holding was reaffirmed in *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186, 192–193 (1946), where the Court rejected the claim that applying the Fair Labor Standards Act to a newspaper publishing business would abridge the freedom of press guaranteed by the First Amendment. See also *Mabee* v. *White Plains Publishing Co.,* 327 U. S. 178 (1946). *Associated Press* v. *United States,* 326 U. S. 1 (1945), similarly overruled assertions that the First Amendment precluded application of the Sherman Act to a news-gathering and disseminating organization. Cf. *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.,* 293 U. S. 268, 276 (1934); *Citizen Publishing Co.* v. *United States,* 394 U. S. 131, 139 (1969); *Lorain Journal Co.* v. *United States,* 342 U. S. 143, 155–156 (1951). Likewise, a newspaper may be subjected to nondiscriminatory forms of general taxation. *Grosjean* v. *American Press Co.,* 297 U. S. 233, 250 (1936); *Murdock* v. *Pennsylvania,* 319 U. S. 105, 112 (1943).

The prevailing view is that the press is not free to publish with impunity everything and anything it desires to publish. Although it may deter or regulate what is said or published, the press may not circulate knowing or reckless falsehoods damaging to private reputation without subjecting itself to liability for damages, including punitive damages, or even criminal prosecution. See *New York Times Co.* v. *Sullivan,* 376 U. S. 254,

279–280 (1964); *Garrison* v. *Louisiana*, 379 U. S. 64, 74 (1964); *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 147 (1967) (opinion of Harlan, J.,); *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 277 (1971). A newspaper or a journalist may also be punished for contempt of court, in appropriate circumstances. *Craig* v. *Harney*, 331 U. S. 367, 377–378 (1947).

It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. *Zemel* v. *Rusk*, 381 U. S. 1, 16–17 (1965); *New York Times Co.* v. *United States*, 403 U. S. 713, 728–730 (1971), (STEWART, J., concurring); *Tribune Review Publishing Co.* v. *Thomas*, 254 F. 2d 883, 885 (CA3 1958); *In the Matter of United Press Assns.* v. *Valente*, 308 N. Y. 71, 77, 123 N. E. 2d 777, 778 (1954). In *Zemel* v. *Rusk*, *supra*, for example, the Court sustained the Government's refusal to validate passports to Cuba even though that restriction "render[ed] less than wholly free the flow of information concerning that country." *Id.*, at 16. The ban on travel was held constitutional, for "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." *Id.*, at 17.[22]

Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or

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[22] "There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right." 381 U. S., at 16–17.

disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal. In *Sheppard* v. *Maxwell,* 384 U. S. 333 (1966), for example, the Court reversed a state court conviction where the trial court failed to adopt "stricter rules governing the use of the courtroom by newsmen, as Sheppard's counsel requested," neglected to insulate witnesses from the press, and made no "effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides." *Id.,* at 358, 359. "[T]he trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters." *Id.,* at 361. See also *Estes* v. *Texas,* 381 U. S. 532, 539–540 (1965); *Rideau* v. *Louisiana,* 373 U. S. 723, 726 (1963).

It is thus not surprising that the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation. At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury. See, *e. g., Ex parte Lawrence,* 116 Cal. 298, 48 P. 124 (1897); *Plunkett* v. *Hamilton,* 136 Ga. 72, 70 S. E. 781 (1911); *Clein* v. *State,* 52 So. 2d 117 (Fla. 1950); *In re Grunow,* 84 N. J. L. 235, 85 A. 1011 (1913); *People ex rel. Mooney* v. *Sheriff,* 269 N. Y. 291, 199 N. E. 415 (1936); *Joslyn* v. *People,* 67 Colo. 297, 184 P. 375 (1919); *Adams* v. *Associated Press,* 46 F. R. D. 439 (SD Tex. 1969); *Brewster* v. *Boston Herald-Traveler Corp.,* 20 F. R. D. 416 (Mass. 1957). See generally Annot., 7 A. L. R. 3d 591 (1966). In 1958, a news gatherer asserted for the first time that the First Amend-

ment exempted confidential information from public disclosure pursuant to a subpoena issued in a civil suit, *Garland* v. *Torre*, 259 F. 2d 545 (CA2), cert. denied, 358 U. S. 910 (1958), but the claim was denied, and this argument has been almost uniformly rejected since then, although there are occasional dicta that, in circumstances not presented here, a newsman might be excused. *In re Goodfader*, 45 Haw. 317, 367 P. 2d 472 (1961); *In re Taylor*, 412 Pa. 32, 193 A. 2d 181 (1963); *State* v. *Buchanan*, 250 Ore. 244, 436 P. 2d 729, cert. denied, 392 U. S. 905 (1968); *Murphy* v. *Colorado* (No. 19604, Sup. Ct. Colo.), cert. denied, 365 U. S. 843 (1961) (unreported, discussed in *In re Goodfader, supra*, at 366, 367 P. 2d, at 498 (Mizuha, J., dissenting)). These courts have applied the presumption against the existence of an asserted testimonial privilege, *United States* v. *Bryan*, 339 U. S. 323, 331 (1950), and have concluded that the First Amendment interest asserted by the newsman was outweighed by the general obligation of a citizen to appear before a grand jury or at trial, pursuant to a subpoena, and give what information he possesses. The opinions of the state courts in *Branzburg* and *Pappas* are typical of the prevailing view, although a few recent cases, such as *Caldwell*, have recognized and given effect to some form of constitutional newsman's privilege. See *State* v. *Knops*, 49 Wis. 2d 647, 183 N. W. 2d 93 (1971) (dictum); *Alioto* v. *Cowles Communications, Inc.*, C. A. No. 52150 (ND Cal. 1969); *In re Grand Jury Witnesses*, 322 F. Supp. 573 (ND Cal. 1970); *People* v. *Dohrn*, Crim. No. 69–3808 (Cook County, Ill., Cir. Ct. 1970).

The prevailing constitutional view of the newsman's privilege is very much rooted in the ancient role of the grand jury that has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against un-

founded criminal prosecutions.[23] Grand jury proceedings are constitutionally mandated for the institution of federal criminal prosecutions for capital or other serious crimes, and "its constitutional prerogatives are rooted in long centuries of Anglo-American history." *Hannah* v. *Larche*, 363 U. S. 420, 489–490 (1960) (Frankfurter, J., concurring in result). The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[24] The adoption of the grand jury "in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice." *Costello* v. *United States*, 350 U. S. 359, 362 (1956). Although state systems of criminal procedure differ greatly among themselves, the grand jury is similarly guaranteed by many state constitutions and plays an important role in fair and effective law enforcement in the overwhelm-

[23] "Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." *Wood* v. *Georgia*, 370 U. S. 375, 390 (1962) (footnote omitted).

[24] It has been held that "infamous" punishments include confinement at hard labor, *United States* v. *Moreland*, 258 U. S. 433 (1922); incarceration in a penitentiary, *Mackin* v. *United States*, 117 U. S. 348 (1886); and imprisonment for more than a year, *Barkman* v. *Sanford*, 162 F. 2d 592 (CA5), cert. denied, 332 U. S. 816 (1947). Fed. Rule Crim. Proc. 7 (a) has codified these holdings: "An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information."

ing majority of the States.[25] Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Blair* v. *United States*, 250 U. S. 273, 282 (1919). Hence, the grand jury's authority to subpoena witnesses is not only historic, *id.*, at 279–281, but essential to its task. Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that "the public . . . has a right to every man's evidence," except for those persons protected by a constitutional, common-law, or statutory privilege, *United States* v. *Bryan*, 339 U. S., at 331; *Blackmer* v. *United States*, 284 U. S. 421, 438 (1932); 8 J. Wigmore, Evidence § 2192 (McNaughton rev. 1961), is particularly applicable to grand jury proceedings.[26]

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[25] Although indictment by grand jury is not part of the due process of law guaranteed to state criminal defendants by the Fourteenth Amendment, *Hurtado* v. *California*, 110 U. S. 516 (1884), a recent study reveals that 32 States require that certain kinds of criminal prosecutions be initiated by indictment. Spain, The Grand Jury, Past and Present: A Survey, 2 Am. Crim. L. Q. 119, 126–142 (1964). In the 18 States in which the prosecutor may proceed by information, the grand jury is retained as an alternative means of invoking the criminal process and as an investigative tool. *Ibid.*

[26] Jeremy Bentham vividly illustrated this maxim:

"Are men of the first rank and consideration—are men high in office—men whose time is not less valuable to the public than to themselves—are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty

A number of States have provided newsmen a statutory privilege of varying breadth,[27] but the majority have not done so, and none has been provided by federal statute.[28] Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Con-

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cause? Yes, as far as it is necessary, they and everybody. . . . Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly." 4 The Works of Jeremy Bentham 320–321 (J. Bowring ed. 1843).

In *United States* v. *Burr*, 25 F. Cas. 30, 34 (No. 14,692d) (CC Va. 1807), Chief Justice Marshall, sitting on Circuit, opined that in proper circumstances a subpoena could be issued to the President of the United States.

[27] Thus far, 17 States have provided some type of statutory protection to a newsman's confidential sources:

Ala. Code, Tit. 7, § 370 (1960); Alaska Stat. § 09.25.150 (Supp. 1971); Ariz. Rev. Stat. Ann. § 12–2237 (Supp. 1971–1972); Ark. Stat. Ann. § 43–917 (1964); Cal. Evid. Code § 1070 (Supp. 1972); Ind. Ann. Stat. § 2–1733 (1968); Ky. Rev. Stat. § 421.100 (1962); La. Rev. Stat. Ann. §§ 45:1451–45:1454 (Supp. 1972); Md. Ann. Code, Art. 35, § 2 (1971); Mich. Comp. Laws § 767.5a (Supp. 1956), Mich. Stat. Ann. § 28.945 (1) (1954); Mont. Rev. Codes Ann. § 93–601–2 (1964); Nev. Rev. Stat. § 49.275 (1971); N. J. Rev. Stat. §§ 2A:84A–21, 2A:84A–29 (Supp. 1972–1973); N. M. Stat. Ann. § 20–1–12.1 (1970); N. Y. Civ. Rights Law § 79–h (Supp. 1971–1972); Ohio Rev. Code Ann. § 2739.12 (1954); Pa. Stat. Ann., Tit. 28, § 330 (Supp. 1972–1973).

[28] Such legislation has been introduced, however. See, *e. g.*, S. 1311, 92d Cong., 1st Sess. (1971); S. 3552, 91st Cong., 2d Sess. (1970); H. R. 16328, H. R. 16704, 91st Cong., 2d Sess. (1970); S. 1851, 88th Cong., 1st Sess. (1963); H. R. 8519, H. R. 7787, 88th Cong., 1st Sess. (1963); S. 965, 86th Cong., 1st Sess. (1959); H. R. 355, 86th Cong., 1st Sess. (1959). For a general analysis of proposed congressional legislation, see Staff of Senate Committee on the Judiciary, 89th Cong., 2d Sess., The Newsman's Privilege (Comm. Print 1966).

stitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.[29] Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant

[29] The creation of new testimonial privileges has been met with disfavor by commentators since such privileges obstruct the search for truth. Wigmore condemns such privileges as "so many derogations from a positive general rule [that everyone is obligated to testify when properly summoned]" and as "obstacle[s] to the administration of justice." 8 J. Wigmore, Evidence § 2192 (McNaughton rev. 1961). His criticism that *"all privileges of exemption from this duty are exceptional,* and are therefore to be discountenanced," *id.,* at § 2192, p. 73 (emphasis in original) has been frequently echoed. Morgan, Foreword, Model Code of Evidence 22–30 (1942); 2 Z. Chafee, Government and Mass Communications 496–497 (1947); Report of ABA Committee on Improvements in the Law of Evidence, 63 A. B. A. Reports 595 (1938); C. McCormick, Evidence 159 (2d ed. 1972); Chafee, Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?, 52 Yale L. J. 607 (1943); Ladd, Privileges, 1969 Law & the Social Order 555, 556; 58 Am. Jur., Witnesses § 546 (1948); 97 C. J. S., Witnesses § 259 (1957); *McMann* v. *Securities and Exchange Commission,* 87 F. 2d 377, 378 (CA2 1937) (L. Hand, J.). Neither the ALI's Model Code of Evidence (1942), the Uniform Rules of Evidence of the National Conference of Commissioners on Uniform State Laws (1953), nor the Proposed Rules of Evidence for the United States Courts and Magistrates (rev. ed. 1971) has included a newsman's privilege.

questions put to them in the course of a valid grand jury investigation or criminal trial.

This conclusion itself involves no restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire, nor does it threaten the vast bulk of confidential relationships between reporters and their sources. Grand juries address themselves to the issues of whether crimes have been committed and who committed them. Only where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas. Nothing before us indicates that a large number or percentage of *all* confidential news sources falls into either category and would in any way be deterred by our holding that the Constitution does not, as it never has, exempt the newsman from performing the citizen's normal duty of appearing and furnishing information relevant to the grand jury's task.

The preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection. It would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news. Neither is immune, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial. The Amendment does not reach so far as to override the interest of the public in en-

suring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons. To assert the contrary proposition

> "is to answer it, since it involves in its very statement the contention that the freedom of the press is the freedom to do wrong with impunity and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends. . . . It suffices to say that, however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing." *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, 419–420 (1918).[30]

Thus, we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not.

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[30] The holding in this case involved a construction of the Contempt of Court Act of 1831, 4 Stat. 487, which permitted summary trial of contempts "so near [to the court] as to obstruct the administration of justice." The Court held that the Act required only that the conduct have a "direct tendency to prevent and obstruct the discharge of judicial duty." 247 U. S., at 419. This view was overruled and the Act given a much narrower reading in *Nye* v. *United States,* 313 U. S. 33, 47–52 (1941). See *Bloom* v. *Illinois,* 391 U. S. 194, 205–206 (1968).

There remain those situations where a source is not engaged in criminal conduct but has information suggesting illegal conduct by others. Newsmen frequently receive information from such sources pursuant to a tacit or express agreement to withhold the source's name and suppress any information that the source wishes not published. Such informants presumably desire anonymity in order to avoid being entangled as a witness in a criminal trial or grand jury investigation. They may fear that disclosure will threaten their job security or personal safety or that it will simply result in dishonor or embarrassment.

The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational, nor are the records before us silent on the matter. But we remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury. The available data indicate that some newsmen rely a great deal on confidential sources and that some informants are particularly sensitive to the threat of exposure and may be silenced if it is held by this Court that, ordinarily, newsmen must testify pursuant to subpoenas,[31] but the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen. Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and

[31] Respondent Caldwell attached a number of affidavits from prominent newsmen to his initial motion to quash, which detail the experiences of such journalists after they have been subpoenaed. Appendix to No. 70–57, pp. 22–61.

to a great extent speculative.[32] It would be difficult to canvass the views of the informants themselves; surveys of reporters on this topic are chiefly opinions of predicted informant behavior and must be viewed in the light of the professional self-interest of the interviewees.[33] Reliance by the press on confidential informants does not mean that all such sources will in fact dry up because of the later possible appearance of the newsman before a grand jury. The reporter may never be called and if he objects to testifying, the prosecution may not insist. Also, the relationship of many informants to the press is a symbiotic one which is unlikely to be greatly inhibited by the threat of subpoena: quite often, such informants are members of a minority political or cultural group that

[32] Cf., *e. g.*, the results of a study conducted by Guest & Stanzler, which appears as an appendix to their article, *supra*, n. 20. A number of editors of daily newspapers of varying circulation were asked the question, "Excluding one- or two-sentence gossip items, on the average how many stories based on information received in confidence are published in your paper each year? Very rough estimate." Answers varied significantly, *e. g.*, "Virtually innumerable," Tucson Daily Citizen (41,969 daily circ.), "Too many to remember," Los Angeles Herald-Examiner (718,221 daily circ.), "Occasionally," Denver Post (252,084 daily circ.), "Rarely," Cleveland Plain Dealer (370,499 daily circ.), "Very rare, some politics," Oregon Journal (146,403 daily circ.). This study did not purport to measure the extent of deterrence of informants caused by subpoenas to the press.

[33] In his Press Subpoenas: An Empirical and Legal Analysis, Study Report of the Reporters' Committee on Freedom of the Press 6–12, Prof. Vince Blasi discusses these methodological problems. Prof. Blasi's survey found that slightly more than half of the 975 reporters questioned said that they relied on regular confidential sources for at least 10% of their stories. *Id.*, at 21. Of this group of reporters, only 8% were able to say with some certainty that their professional functioning had been adversely affected by the threat of subpoena; another 11% were not certain whether or not they had been adversely affected. *Id.*, at 53.

relies heavily on the media to propagate its views, publicize its aims, and magnify its exposure to the public. Moreover, grand juries characteristically conduct secret proceedings, and law enforcement officers are themselves experienced in dealing with informers, and have their own methods for protecting them without interference with the effective administration of justice. There is little before us indicating that informants whose interest in avoiding exposure is that it may threaten job security, personal safety, or peace of mind, would in fact be in a worse position, or would think they would be, if they risked placing their trust in public officials as well as reporters. We doubt if the informer who prefers anonymity but is sincerely interested in furnishing evidence of crime will always or very often be deterred by the prospect of dealing with those public authorities characteristically charged with the duty to protect the public interest as well as his.

Accepting the fact, however, that an undetermined number of informants not themselves implicated in crime will nevertheless, for whatever reason, refuse to talk to newsmen if they fear identification by a reporter in an official investigation, we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.

We note first that the privilege claimed is that of the reporter, not the informant, and that if the authorities independently identify the informant, neither his own reluctance to testify nor the objection of the newsman would shield him from grand jury inquiry, whatever the impact on the flow of news or on his future usefulness as a secret source of information. More impor-

tant, it is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy. Historically, the common law recognized a duty to raise the "hue and cry" and report felonies to the authorities.[34] Misprision of a felony—that is, the concealment of a felony "which a man knows, but never assented to . . . [so as to become] either principal or accessory," 4 W. Blackstone, Commentaries *121, was often said to be a common-law crime.[35] The first Congress passed a statute, 1 Stat. 113, § 6, as amended, 35 Stat. 1114, § 146, 62 Stat. 684, which is still in effect, defining a federal crime of misprision:

> "Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be [guilty of misprision]." 18 U. S. C. § 4.[36]

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[34] See Statute of Westminster First, 3 Edw. 1, c. 9, p. 43 (1275); Statute of Westminster Second, 13 Edw. 1, c. 6, pp. 114–115 (1285); Sheriffs Act of 1887, 50 & 51 Vict., c. 55, § 8 (1); 4 W. Blackstone, Commentaries *293–295; 2 W. Holdsworth, History of English Law 80–81, 101–102 (3d ed. 1927); 4 *id.*, at 521–522.

[35] See, *e. g.*, *Scrope's Case*, referred to in 3 Coke's Institute 36; *Rex* v. *Cowper*, 5 Mod. 206, 87 Eng. Rep. 611 (1696); Proceedings under a Special Commission for the County of York, 31 How. St. Tr. 965, 969 (1813); *Sykes* v. *Director of Public Prosecutions*, [1961] 3 W. L. R. 371. But see Glazebrook, Misprision of Felony—Shadow or Phantom?, 8 Am. J. Legal Hist. 189 (1964). See also Act 5 & 6 Edw. 6, c. 11 (1552).

[36] This statute has been construed, however, to require both knowledge of a crime and some affirmative act of concealment or participation. *Bratton* v. *United States*, 73 F. 2d 795 (CA10 1934); *United States* v. *Farrar*, 38 F. 2d 515, 516 (Mass.), aff'd on other grounds,

It is apparent from this statute, as well as from our history and that of England, that concealment of crime and agreements to do so are not looked upon with favor. Such conduct deserves no encomium, and we decline now to afford it First Amendment protection by denigrating the duty of a citizen, whether reporter or informer, to respond to grand jury subpoena and answer relevant questions put to him.

Of course, the press has the right to abide by its agreement not to publish all the information it has, but the right to withhold news is not equivalent to a First Amendment exemption from the ordinary duty of all other citizens to furnish relevant information to a grand jury performing an important public function. Private restraints on the flow of information are not so favored by the First Amendment that they override all other public interests. As Mr. Justice Black declared in another context, "[f]reedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press* v. *United States,* 326 U. S., at 20.

Neither are we now convinced that a virtually impenetrable constitutional shield, beyond legislative or judicial control, should be forged to protect a private system of informers operated by the press to report on criminal conduct, a system that would be unaccountable to the public, would pose a threat to the citizen's justifiable expectations of privacy, and would equally protect well-intentioned informants and those who for pay or otherwise betray their trust to their employer or associates. The public through its elected and appointed

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281 U. S. 624 (1930); *United States* v. *Norman,* 391 F. 2d 212 (CA6), cert. denied, 390 U. S. 1014 (1968); *Lancey* v. *United States,* 356 F. 2d 407 (CA9), cert. denied, 385 U. S. 922 (1966). Cf. *Marbury* v. *Brooks,* 7 Wheat. 556, 575 (1822) (Marshall, C. J.).

law enforcement officers regularly utilizes informers, and in proper circumstances may assert a privilege against disclosing the identity of these informers. But

> "[t]he purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." *Roviaro* v. *United States,* 353 U. S. 53, 59 (1957).

Such informers enjoy no constitutional protection. Their testimony is available to the public when desired by grand juries or at criminal trials; their identity cannot be concealed from the defendant when it is critical to his case. *Id.,* at 60–61, 62; *McCray* v. *Illinois,* 386 U. S. 300, 310 (1967); *Smith* v. *Illinois,* 390 U. S. 129, 131 (1968); *Alford* v. *United States,* 282 U. S. 687, 693 (1931). Clearly, this system is not impervious to control by the judiciary and the decision whether to unmask an informer or to continue to profit by his anonymity is in public, not private, hands. We think that it should remain there and that public authorities should retain the options of either insisting on the informer's testimony relevant to the prosecution of crime or of seeking the benefit of further information that his exposure might prevent.

We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. From the beginning of our country the press has operated without constitutional pro-

tection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press.[37]

It is said that currently press subpoenas have multiplied,[38] that mutual distrust and tension between press and officialdom have increased, that reporting styles have changed, and that there is now more need for confidential sources, particularly where the press seeks news about minority cultural and political groups or dissident organizations suspicious of the law and public officials. These developments, even if true, are treacherous grounds for a far-reaching interpretation of the First Amendment fastening a nationwide rule on courts, grand juries, and prosecuting officials everywhere. The obligation to testify in response to grand jury subpoenas will not threaten these sources not involved with criminal conduct and without information relevant to grand jury investigations, and we cannot hold that the Constitution places the sources in these two categories either above the law or beyond its reach.

The argument for such a constitutional privilege rests heavily on those cases holding that the infringement of protected First Amendment rights must be no broader than necessary to achieve a permissible governmental purpose, see cases cited at n. 19, *supra*. We do not deal, however, with a governmental institution that has abused

[37] Though the constitutional argument for a newsman's privilege has been put forward very recently, newsmen have contended for a number of years that such a privilege was desirable. See, *e. g.*, Siebert & Ryniker, Press Winning Fight to Guard Sources, Editor & Publisher, Sept. 1, 1934, pp. 9, 36–37; G. Bird & F. Merwin, The Press and Society 592 (1971). The first newsman's privilege statute was enacted by Maryland in 1896, and currently is codified as Md. Ann. Code, Art. 35, § 2 (1971).

[38] A list of recent subpoenas to the news media is contained in the appendix to the brief of *amicus* New York Times in No. 70–57.

its proper function, as a legislative committee does when it "expose[s] for the sake of exposure." *Watkins* v. *United States,* 354 U. S. 178, 200 (1957). Nothing in the record indicates that these grand juries were "prob-[ing] at will and without relation to existing need." *DeGregory* v. *Attorney General of New Hampshire,* 383 U. S. 825, 829 (1966). Nor did the grand juries attempt to invade protected First Amendment rights by forcing wholesale disclosure of names and organizational affiliations for a purpose that was not germane to the determination of whether crime has been committed, cf. *NAACP* v. *Alabama,* 357 U. S. 449 (1958); *NAACP* v. *Button,* 371 U. S. 415 (1963); *Bates* v. *Little Rock,* 361 U. S. 516 (1960), and the characteristic secrecy of grand jury proceedings is a further protection against the undue invasion of such rights. See Fed. Rule Crim. Proc. 6 (e). The investigative power of the grand jury is necessarily broad if its public responsibility is to be adequately discharged. *Costello* v. *United States,* 350 U. S., at 364.

The requirements of those cases, see n. 18, *supra,* which hold that a State's interest must be "compelling" or "paramount" to justify even an indirect burden on First Amendment rights, are also met here. As we have indicated, the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen, and it appears to us that calling reporters to give testimony in the manner and for the reasons that other citizens are called "bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification." *Bates* v. *Little Rock, supra,* at 525. If the test is that the government "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest," *Gibson* v. *Florida Legislative Investigation Committee,*

372 U. S. 539, 546 (1963), it is quite apparent (1) that the State has the necessary interest in extirpating the traffic in illegal drugs, in forestalling assassination attempts on the President, and in preventing the community from being disrupted by violent disorders endangering both persons and property; and (2) that, based on the stories Branzburg and Caldwell wrote and Pappas' admitted conduct, the grand jury called these reporters as they would others—because it was likely that they could supply information to help the government determine whether illegal conduct had occurred and, if it had, whether there was sufficient evidence to return an indictment.

Similar considerations dispose of the reporters' claims that preliminary to requiring their grand jury appearance, the State must show that a crime has been committed and that they possess relevant information not available from other sources, for only the grand jury itself can make this determination. The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. To this end it must call witnesses, in the manner best suited to perform its task. "When the grand jury is performing its investigatory function into a general problem area . . . society's interest is best served by a thorough and extensive investigation." *Wood* v. *Georgia,* 370 U. S. 375, 392 (1962). A grand jury investigation "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." *United States* v. *Stone,* 429 F. 2d 138, 140 (CA2 1970). Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors. *Costello* v. *United States,* 350 U. S., at 362. It is

only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made.

> "It is impossible to conceive that in such cases the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall be indicted." *Hale* v. *Henkel*, 201 U. S. 43, 65 (1906).

See also *Hendricks* v. *United States*, 223 U. S. 178 (1912); *Blair* v. *United States*, 250 U. S., at 282–283. We see no reason to hold that these reporters, any more than other citizens, should be excused from furnishing information that may help the grand jury in arriving at its initial determinations.

The privilege claimed here is conditional, not absolute; given the suggested preliminary showings and compelling need, the reporter would be required to testify. Presumably, such a rule would reduce the instances in which reporters could be required to appear, but predicting in advance when and in what circumstances they could be compelled to do so would be difficult. Such a rule would also have implications for the issuance of compulsory process to reporters at civil and criminal trials and at legislative hearings. If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem.[39] For them, it would appear that only an absolute privilege would suffice.

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[39] "Under the case-by-case method of developing rules, it will be difficult for potential informants and reporters to predict whether testimony will be compelled since the decision will turn on the judge's ad hoc assessment in different fact settings of 'importance' or 'relevance' in relation to the free press interest. A 'general' deterrent

We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's priv-

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effect is likely to result. This type of effect stems from the vagueness of the tests and from the uncertainty attending their application. For example, if a reporter's information goes to the 'heart of the matter' in Situation X, another reporter and informant who subsequently are in Situation Y will not know if 'heart of the matter rule X' will be extended to them, and deterrence will thereby result. Leaving substantial discretion with judges to delineate those 'situations' in which rules of 'relevance' or 'importance' apply would therefore seem to undermine significantly the effectiveness of a reporter-informer privilege." Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L. J. 317, 341 (1970).

In re Grand Jury Witnesses, 322 F. Supp. 573 (ND Cal. 1970), illustrates the impact of this *ad hoc* approach. Here, the grand jury was, as in *Caldwell*, investigating the Black Panther Party, and was "inquiring into matters which involve possible violations of Congressional acts passed to protect the person of the President (18 U. S. C. § 1751), to free him from threats (18 U. S. C. § 871), to protect our armed forces from unlawful interference (18 U. S. C. § 2387), conspiracy to commit the foregoing offenses (18 U. S. C. § 371), and related statutes prohibiting acts directed against the security of the government." *Id.*, at 577. The two witnesses, reporters for a Black Panther Party newspaper, were subpoenaed and given Fifth Amendment immunity against criminal prosecution, and they claimed a First Amendment journalist's privilege. The District Court entered a protective order, allowing them to refuse to divulge confidential information until the Government demonstrated "a compelling and overriding national interest in requiring the testimony of [the witnesses] which cannot be served by any alternative means." *Id.*, at 574. The Government claimed that it had information that the witnesses had associated with persons who had conspired to perform some of the criminal acts that the grand jury was investigating. The court held the Government had met its burden and ordered the witnesses to testify:

"The whole point of the investigation is to identify persons known to the [witnesses] who may have engaged in activities violative of the above indicated statutes, and also to ascertain the details of their alleged unlawful activities. All questions directed to such

ilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. Cf. *In re Grand Jury Witnesses*, 322 F. Supp. 573, 574 (ND Cal. 1970). Freedom of the press is a "fundamental personal right" which "is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *Griffin*, 303 U. S. 444, 450, 452 (1938). See also *Mills*

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objectives of the investigation are unquestionably relevant, and any other evaluation thereof by the Court without knowledge of the facts before the Grand Jury would clearly constitute 'undue interference of the Court.'" *Id.*, at 577.

Another illustration is provided by *State* v. *Knops*, 49 Wis. 2d 647, 183 N. W. 2d 93 (1971), in which a grand jury was investigating the August 24, 1970, bombing of Sterling Hall on the University of Wisconsin Madison campus. On August 26, 1970, an "underground" newspaper, the Madison Kaleidoscope, printed a front-page story entitled "The Bombers Tell Why and What Next—Exclusive to Kaleidoscope." An editor of the Kaleidoscope was subpoenaed, appeared, asserted his Fifth Amendment right against self-incrimination, was given immunity, and then pleaded that he had a First Amendment privilege against disclosing his confidential informants. The Wisconsin Supreme Court rejected his claim and upheld his contempt sentence: "[Appellant] faces five very narrow and specific questions, all of which are founded on information which he himself has already volunteered. The purpose of these questions is very clear. The need for answers to them is 'overriding,' to say the least. The need for these answers is nothing short of the public's need (and right) to protect itself from physical attack by apprehending the perpetrators of such attacks." 49 Wis. 2d, at 658, 183 N. W. 2d., at 98–99.

v. *Alabama*, 384 U. S. 214, 219 (1966); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 111 (1943). The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury.[40]

In each instance where a reporter is subpoenaed to testify, the courts would also be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporter's appearance: Is there probable cause to believe a crime has been committed? Is it likely that the reporter has useful information gained in confidence? Could the grand jury obtain the information elsewhere? Is the official interest sufficient to outweigh the claimed privilege?

Thus, in the end, by considering whether enforcement of a particular law served a "compelling" governmental interest, the courts would be inextricably involved in

[40] Such a privilege might be claimed by groups that set up newspapers in order to engage in criminal activity and to therefore be insulated from grand jury inquiry, regardless of Fifth Amendment grants of immunity. It might appear that such "sham" newspapers would be easily distinguishable, yet the First Amendment ordinarily prohibits courts from inquiring into the content of expression, except in cases of obscenity or libel, and protects speech and publications regardless of their motivation, orthodoxy, truthfulness, timeliness, or taste. *New York Times Co.* v. *Sullivan*, 376 U. S., at 269–270; *Kingsley Pictures Corp.* v. *Regents*, 360 U. S. 684, 689 (1959); *Winters* v. *New York*, 333 U. S. 507, 510 (1948); *Thomas* v. *Collins*, 323 U. S., at 537. By affording a privilege to some organs of communication but not to others, courts would inevitably be discriminating on the basis of content.

distinguishing between the value of enforcing different criminal laws. By requiring testimony from a reporter in investigations involving some crimes but not in others, they would be making a value judgment that a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution. The task of judges, like other officials outside the legislative branch, is not to make the law but to uphold it in accordance with their oaths.

At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute.

In addition, there is much force in the pragmatic view that the press has at its disposal powerful mechanisms of communication and is far from helpless to protect itself from harassment or substantial harm. Furthermore, if what the newsmen urged in these cases is true—that law enforcement cannot hope to gain and may suffer from subpoenaing newsmen before grand juries—prosecutors will be loath to risk so much for so little. Thus, at the federal level the Attorney General has already fashioned a set of rules for federal officials in con-

nection with subpoenaing members of the press to testify before grand juries or at criminal trials.[41] These rules are a major step in the direction the reporters herein desire to move. They may prove wholly sufficient to resolve the bulk of disagreements and controversies between press and federal officials.

Finally, as we have earlier indicated, news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment.[42] Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relation-

[41] The Guidelines for Subpoenas to the News Media were first announced in a speech by the Attorney General on August 10, 1970, and then were expressed in Department of Justice Memo. No. 692 (Sept. 2, 1970), which was sent to all United States Attorneys by the Assistant Attorney General in charge of the Criminal Division. The Guidelines state that: "The Department of Justice recognizes that compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights. In determining whether to request issuance of a subpoena to the press, the approach in every case must be to weigh that limiting effect against the public interest to be served in the fair administration of justice" and that: "The Department of Justice does not consider the press 'an investigative arm of the government.' Therefore, all reasonable attempts should be made to obtain information from non-press sources before there is any consideration of subpoenaing the press." The Guidelines provide for negotiations with the press and require the express authorization of the Attorney General for such subpoenas. The principles to be applied in authorizing such subpoenas are stated to be whether there is "sufficient reason to believe that the information sought [from the journalist] is essential to a successful investigation," and whether the Government has unsuccessfully attempted to obtain the information from alternative non-press sources. The Guidelines provide, however, that in "emergencies and other unusual situations," subpoenas may be issued which do not exactly conform to the Guidelines.

[42] Cf. *Younger* v. *Harris*, 401 U. S. 37, 49, 53–54 (1971).

ship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.

III

We turn, therefore, to the disposition of the cases before us. From what we have said, it necessarily follows that the decision in *United States* v. *Caldwell*, No. 70–57, must be reversed. If there is no First Amendment privilege to refuse to answer the relevant and material questions asked during a good-faith grand jury investigation, then it is *a fortiori* true that there is no privilege to refuse to appear before such a grand jury until the Government demonstrates some "compelling need" for a newsman's testimony. Other issues were urged upon us, but since they were not passed upon by the Court of Appeals, we decline to address them in the first instance.

The decisions in No. 70–85, *Branzburg* v. *Hayes* and *Branzburg* v. *Meigs*, must be affirmed. Here, petitioner refused to answer questions that directly related to criminal conduct that he had observed and written about. The Kentucky Court of Appeals noted that marihuana is defined as a narcotic drug by statute, Ky. Rev. Stat. § 218.010 (14) (1962), and that unlicensed possession or compounding of it is a felony punishable by both fine and imprisonment. Ky. Rev. Stat. § 218.210 (1962). It held that petitioner "saw the commission of the statutory felonies of unlawful possession of marijuana and the unlawful conversion of it into hashish," in *Branzburg* v. *Pound*, 461 S. W. 2d, at 346. Petitioner may be presumed to have observed similar violations of the state narcotics laws during the research he did for the story that forms the basis of the subpoena in *Branzburg* v. *Meigs*. In both cases, if what petitioner wrote was true,

he had direct information to provide the grand jury concerning the commission of serious crimes.

The only question presented at the present time in *In re Pappas,* No. 70–94, is whether petitioner Pappas must appear before the grand jury to testify pursuant to subpoena. The Massachusetts Supreme Judicial Court characterized the record in this case as "meager," and it is not clear what petitioner will be asked by the grand jury. It is not even clear that he will be asked to divulge information received in confidence. We affirm the decision of the Massachusetts Supreme Judicial Court and hold that petitioner must appear before the grand jury to answer the questions put to him, subject, of course, to the supervision of the presiding judge as to "the propriety, purposes, and scope of the grand jury inquiry and the pertinence of the probable testimony." 358 Mass., at 614, 266 N. E. 2d, at 303–304.

So ordered.

MR. JUSTICE POWELL, concurring.

I add this brief statement to emphasize what seems to me to be the limited nature of the Court's holding. The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources. Certainly, we do not hold, as suggested in MR. JUSTICE STEWART'S dissenting opinion, that state and federal authorities are free to "annex" the news media as "an investigative arm of government." The solicitude repeatedly shown by this Court for First Amendment freedoms should be sufficient assurance against any such effort, even if one seriously believed that the media—properly free and untrammeled in the fullest sense of these terms—were not able to protect themselves.

As indicated in the concluding portion of the opinion, the Court states that no harassment of newsmen will

be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.*

In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.

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*It is to be remembered that Caldwell asserts a constitutional privilege not even to appear before the grand jury unless a court decides that the Government has made a showing that meets the three preconditions specified in the dissenting opinion of MR. JUSTICE STEWART. To be sure, this would require a "balancing" of interests by the court, but under circumstances and constraints significantly different from the balancing that will be appropriate under the court's decision. The newsman witness, like all other witnesses, will have to appear; he will not be in a position to litigate at the threshold the State's very authority to subpoena him. Moreover, absent the constitutional preconditions that Caldwell and that dissenting opinion would impose as heavy burdens of proof to be carried by the State, the court—when called upon to protect a newsman from improper or prejudicial questioning—would be free to balance the competing interests on their merits in the particular case. The new constitutional rule endorsed by that dissenting opinion would, as a practical matter, defeat such a fair balancing and the essential societal interest in the detection and prosecution of crime would be heavily subordinated.

MR. JUSTICE DOUGLAS, dissenting in No. 70–57, *United States* v. *Caldwell.*

Caldwell, a black, is a reporter for the New York Times and was assigned to San Francisco with the hope that he could report on the activities and attitudes of the Black Panther Party. Caldwell in time gained the complete confidence of its members and wrote in-depth articles about them.

He was subpoenaed to appear and testify before a federal grand jury and to bring with him notes and tapes covering interviews with its members. A hearing on a motion to quash was held. The District Court ruled that while Caldwell had to appear before the grand jury, he did not have to reveal confidential communications unless the court was satisfied that there was a "compelling and overriding national interest." See 311 F. Supp. 358, 362. Caldwell filed a notice of appeal and the Court of Appeals dismissed the appeal without opinion.

Shortly thereafter a new grand jury was impaneled and it issued a new subpoena for Caldwell to testify. On a motion to quash, the District Court issued an order substantially identical to its earlier one.

Caldwell refused to appear and was held in contempt. On appeal, the Court of Appeals vacated the judgment of contempt. It said that the revealing of confidential sources of information jeopardized a First Amendment freedom and that Caldwell did not have to appear before the grand jury absent a showing that there was a "compelling and overriding national interest" in pursuing such an interrogation.

The District Court had found that Caldwell's knowledge of the activities of the Black Panthers "derived in substantial part" from information obtained "within the scope of a relationship of trust and confidence." *Id.*, at 361. It also found that confidential relationships of this sort are commonly developed and maintained by

professional journalists, and are indispensable to their work of gathering, analyzing, and publishing the news.

The District Court further had found that compelled disclosure of information received by a journalist within the scope of such confidential relationships jeopardized those relationships and thereby impaired the journalist's ability to gather, analyze, and publish the news.

The District Court, finally, had found that, without a protective order delimiting the scope of interrogation of Earl Caldwell by the grand jury, his appearance and examination before the jury would severely impair and damage his confidential relationships with members of the Black Panther Party and other militants, and thereby severely impair and damage his ability to gather, analyze, and publish news concerning them; and that it would also damage and impair the abilities of all reporters to gather, analyze, and publish news concerning them.

The Court of Appeals agreed with the findings of the District Court but held that Caldwell did not have to appear at all before the grand jury absent a "compelling need" shown by the Government. 434 F. 2d 1081.

It is my view that there is no "compelling need" that can be shown which qualifies the reporter's immunity from appearing or testifying before a grand jury, unless the reporter himself is implicated in a crime. His immunity in my view is therefore quite complete, for, absent his involvement in a crime, the First Amendment protects him against an appearance before a grand jury and if he is involved in a crime, the Fifth Amendment stands as a barrier. Since in my view there is no area of inquiry not protected by a privilege, the reporter need not appear for the futile purpose of invoking one to each question. And, since in my view a newsman has an absolute right not to appear before a grand jury, it follows for me that a journalist who voluntarily appears before that body may invoke his First Amendment privilege to specific ques-

tions. The basic issue is the extent to which the First Amendment (which is applicable to investigating committees, *Watkins* v. *United States*, 354 U. S. 178; *NAACP* v. *Alabama*, 357 U. S. 449, 463; *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539; *Baird* v. *State Bar of Arizona*, 401 U. S. 1, 6–7; *In re Stolar*, 401 U. S. 23) must yield to the Government's asserted need to know a reporter's unprinted information.

The starting point for decision pretty well marks the range within which the end result lies. The New York Times, whose reporting functions are at issue here, takes the amazing position that First Amendment rights are to be balanced against other needs or conveniences of government.[1] My belief is that all of the "balancing" was done by those who wrote the Bill of Rights. By casting the First Amendment in absolute terms, they repudiated the timid, watered-down, emasculated versions of the First Amendment which both the Government and the New York Times advance in the case.

My view is close to that of the late Alexander Meiklejohn:[2]

> "For the understanding of these principles it is essential to keep clear the crucial difference between 'the rights' of the governed and 'the powers' of the governors. And at this point, the title 'Bill of Rights' is lamentably inaccurate as a designation

[1] "The three minimal tests we contend must be met before testimony divulging confidences may be compelled from a reporter are these: 1. The government must clearly show that there is probable cause to believe that the reporter possesses information which is specifically relevant to a specific probable violation of law. 2. The government must clearly show that the information it seeks cannot be obtained by alternative means, which is to say, from sources other than the reporter. 3. The government must clearly demonstrate a compelling and overriding interest in the information." Brief for New York Times as *Amicus Curiae* 29.

[2] The First Amendment Is An Absolute, 1961 Sup. Ct. Rev. 245, 254.

> of the first ten amendments. They are not a 'Bill of Rights' but a 'Bill of Powers and Rights.' The Second through the Ninth Amendments limit the powers of the subordinate agencies in order that due regard shall be paid to the private 'rights of the governed.' The First and Tenth Amendments protect the governing 'powers' of the people from abridgment by the agencies which are established as their servants. In the field of our 'rights,' each one of us can claim 'due process of law.' In the field of our governing 'powers,' the notion of 'due process' is irrelevant."

He also believed that "[s]elf-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express," [3] and that "[p]ublic discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power." [4]

Two principles which follow from this understanding of the First Amendment are at stake here. One is that the people, the ultimate governors, must have absolute freedom of, and therefore privacy of, their individual opinions and beliefs regardless of how suspect or strange they may appear to others. Ancillary to that principle is the conclusion that an individual must also have absolute privacy over whatever information he may generate in the course of testing his opinions and beliefs. In this regard, Caldwell's status as a reporter is less relevant than is his status as a student who affirmatively pursued empirical research to enlarge his own intellectual view-

[3] *Id.*, at 255.
[4] *Id.*, at 257.

point. The second principle is that effective self-government cannot succeed unless the people are immersed in a steady, robust, unimpeded, and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and re-examination. In this respect, Caldwell's status as a news gatherer and an integral part of that process becomes critical.

I

Government has many interests that compete with the First Amendment. Congressional investigations determine how existing laws actually operate or whether new laws are needed. While congressional committees have broad powers, they are subject to the restraints of the First Amendment. As we said in *Watkins* v. *United States,* 354 U. S., at 197: "Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking."

Hence, matters of belief, ideology, religious practices, social philosophy, and the like are beyond the pale and of no rightful concern of government, unless the belief or the speech, or other expression has been translated into action. *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 642; *Baird* v. *State Bar of Arizona,* 401 U. S., at 6–7; *In re Stolar,* 401 U. S. 23.

Also at stake here is Caldwell's privacy of association. We have held that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP* v.

Alabama, 357 U. S., at 462; *NAACP* v. *Button*, 371 U. S. 415.

As I said in *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S., at 565: "the associational rights protected by the First Amendment . . . cover the entire spectrum in political ideology as well as in art, in journalism, in teaching, and in religion. . . . [G]overnment is . . . precluded from probing the intimacies of spiritual and intellectual relationships in the myriad of such societies and groups that exist in this country, *regardless of the legislative purpose sought to be served*. . . . If that is not true, I see no barrier to investigation of newspapers, churches, political parties, clubs, societies, unions, and any other association for their political, economic, social, philosophical, or religious views." (Concurring opinion.) (Emphasis added.)

The Court has not always been consistent in its protection of these First Amendment rights and has sometimes allowed a government interest to override the absolutes of the First Amendment. For example, under the banner of the "clear and present danger" test,[5] and later under the influence of the "balancing" formula,[6] the

[5] *E. g.*, *Schenck* v. *United States*, 249 U. S. 47 (wartime anti-draft "leafleting"); *Debs* v. *United States*, 249 U. S. 211 (wartime anti-draft speech); *Abrams* v. *United States*, 250 U. S. 616 (wartime leafleting calling for general strike); *Feiner* v. *New York*, 340 U. S. 315 (arrest of radical speaker without attempt to protect him from hostile audience); *Dennis* v. *United States*, 341 U. S. 494 (reformulation of test as "not improbable" rule to sustain conviction of knowing advocacy of overthrow); *Scales* v. *United States*, 367 U. S. 203 (knowing membership in group which espouses forbidden advocacy is punishable). For a more detailed account of the infamy of the "clear and present danger" test see my concurring opinion in *Brandenburg* v. *Ohio*, 395 U. S. 444, 450.

[6] *E. g.*, *Adler* v. *Board of Education*, 342 U. S. 485 (protection of schools from "pollution" outweighs public teachers' freedom to advocate violent overthrow); *Uphaus* v. *Wyman*, 360 U. S. 72, 79, 81 (preserving security of New Hampshire from subversives

Court has permitted men to be penalized not for any harmful conduct but solely for holding unpopular beliefs.

In recent years we have said over and over again that where First Amendment rights are concerned any regulation "narrowly drawn," [7] must be "compelling" and not

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outweighs privacy of list of participants in suspect summer camp); *Barenblatt* v. *United States*, 360 U. S. 109 (legislative inquiry more important than protecting HUAC witness' refusal to answer whether a third person had been a Communist); *Wilkinson* v. *United States*, 365 U. S. 399 (legislative inquiry more important than protecting HUAC witness' refusal to state whether he was currently a member of the Communist Party); *Braden* v. *United States*, 365 U. S. 431, 435 (legislative inquiry more important than protecting HUAC witness' refusal to state whether he had once been a member of the Communist Party); *Konigsberg* v. *State Bar*, 366 U. S. 36 (regulating membership of bar outweighs interest of applicants in refusing to answer question concerning Communist affiliations); *In re Anastaplo*, 366 U. S. 82 (regulating membership of bar outweighs protection of applicant's belief in Declaration of Independence that citizens should revolt against an oppressive government); *Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1 (national security outweighs privacy of association of leaders of suspect groups); *Law Students Research Council* v. *Wadmond*, 401 U. S. 154 (regulating membership of bar outweighs privacy of applicants' views on the soundness of the Constitution).

[7] Thus, we have held "overbroad" measures which unduly restricted the time, place, and manner of expression. *Schneider* v. *State*, 308 U. S. 147, 161 (anti-leafleting law); *Thornhill* v. *Alabama*, 310 U. S. 88, 102 (anti-boycott statute); *Cantwell* v. *Connecticut*, 310 U. S. 296 (breach-of-peace measure); *Cox* v. *Louisiana*, 379 U. S. 536 (breach-of-peace measure); *Edwards* v. *South Carolina*, 372 U. S. 229 (breach-of-peace statute); *Cohen* v. *California*, 403 U. S. 15, 22 (breach-of-peace statute); *Gooding* v. *Wilson*, 405 U. S. 518 (breach-of-peace statute). But insofar as penalizing the *content* of thought and opinion is concerned, the Court has not in recent Terms permitted any interest to override the absolute privacy of one's philosophy. To be sure, opinions have often adverted to the absence of a compelling justification for attempted intrusions into philosophical or associational privacy. *E. g.*, *Bates* v. *Little Rock*, 361 U. S. 516, 523 (disclosure of NAACP membership lists to city officials); *Gibson* v. *Florida Legislative Investiga-*

merely "rational" as is the case where other activities are concerned.[8] But the "compelling" interest in regulation neither includes paring down or diluting the right, nor

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tion Committee, 372 U. S. 539, 546 (disclosure of NAACP membership list to state legislature); *DeGregory* v. *Attorney General of New Hampshire*, 383 U. S. 825, 829 (witness' refusal to state whether he had been a member of the Communist Party three years earlier); *Baird* v. *State Bar of Arizona*, 401 U. S. 1, 6–7 (refusal of bar applicant to state whether she had been a member of the Communist Party); *In re Stolar*, 401 U. S. 23 (refusal of bar applicant to state whether he was "loyal" to the Government); see also *Street* v. *New York*, 394 U. S. 576 (expression of disgust for flag). Yet, while the rhetoric of these opinions did not expressly embrace an absolute privilege for the privacy of opinions and philosophy, the trend of those results was not inconsistent with and in their totality appeared to be approaching such a doctrine. Moreover, in another group of opinions invalidating for overbreadth intrusions into the realm of belief and association, there was no specification of whether a danger test, a balancing process, an absolute doctrine, or a compelling justification inquiry had been used to detect invalid applications comprehended by the challenged measures. *E. g.*, *Wieman* v. *Updegraff*, 344 U. S. 183 (loyalty test which condemned mere unknowing membership in a suspect group); *Shelton* v. *Tucker*, 364 U. S. 479 (requirement that public teachers disclose all affiliations); *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U. S. 293, 296 (disclosure of NAACP membership lists); *Whitehill* v. *Elkins*, 389 U. S. 54, 59 (nonactive membership in a suspect group a predicate for refusing employment as a public teacher); *United States* v. *Robel*, 389 U. S. 258 (mere membership in Communist Party a sole ground for exclusion from employment in defense facility). Regrettably, the vitality of the overdue trend toward a complete privilege in this area has been drawn into question by quite recent decisions of the Court, *Law Students Research Council* v. *Wadmond*, 401 U. S. 154, holding that bar applicants may be turned away for refusing to disclose their opinions on the soundness of the Constitution; *Cole* v. *Richardson*, 405 U. S. 676, sustaining an oath required of public employees that they will "oppose" a violent overthrow; and, of course, by today's decision.

[8] Where no more than economic interests were affected this Court has upheld legislation only upon a showing that it was "rationally connected" to some permissible state objective. *E. g.*,

embraces penalizing one solely for his intellectual viewpoint; it concerns the State's interest, for example, in regulating the time and place or perhaps manner of exercising First Amendment rights. Thus, one has an undoubted right to read and proclaim the First Amendment in the classroom or in a park. But he would not have the right to blare it forth from a sound truck rolling through the village or city at 2 a. m. The distinction drawn in *Cantwell* v. *Connecticut,* 310 U. S. 296, 303–304, should still stand: "[T]he Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." [9]

Under these precedents there is no doubt that Caldwell could not be brought before the grand jury for the sole purpose of exposing his political beliefs. Yet today the Court effectively permits that result under the guise of allowing an attempt to elicit from him "factual information." To be sure, the inquiry will be couched only in terms of extracting Caldwell's recollection of what was said to him during the interviews, but the fact remains that his questions to the Panthers and therefore the respective answers were guided by Caldwell's own preconceptions and views about the Black Panthers. His

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United States v. *Carolene Products Co.,* 304 U. S. 144, 152; *Goesaert* v. *Cleary,* 335 U. S. 464; *Williamson* v. *Lee Optical Co.,* 348 U. S. 483; *McGowan* v. *Maryland,* 366 U. S. 420; *McDonald* v. *Board of Election Comm'rs,* 394 U. S. 802; *United States* v. *Maryland Savings-Share Ins. Corp.,* 400 U. S. 4; *Richardson* v. *Belcher,* 404 U. S. 78; *Schilb* v. *Kuebel,* 404 U. S. 357.

[9] The majority cites several cases which held that certain burdens on the press were permissible despite incidental burdens on its news-gathering ability. For example, see *Sheppard* v. *Maxwell,* 384 U. S. 333, 358. Even assuming that those cases were rightly decided, the fact remains that in none of them was the Government attempting to extract personal belief from a witness and the privacy of a citizen's personal intellectual viewpoint was not implicated.

entire experience was shaped by his intellectual viewpoint. Unlike the random bystander, those who affirmatively set out to test a hypothesis, as here, have no tidy means of segregating subjective opinion from objective facts.

Sooner or later, any test which provides less than blanket protection to beliefs and associations will be twisted and relaxed so as to provide virtually no protection at all. As Justice Holmes noted in *Abrams* v. *United States*, 250 U. S. 616, 624, such was the fate of the "clear and present danger" test which he had coined in *Schenck* v. *United States*, 249 U. S. 47. Eventually, that formula was so watered down that the danger had to be neither clear nor present but merely "not improbable." *Dennis* v. *United States*, 341 U. S. 494, 510. See my concurring opinion in *Brandenburg* v. *Ohio*, 395 U. S. 444, 450. A compelling-interest test may prove as pliable as did the clear-and-present-danger test. Perceptions of the worth of state objectives will change with the composition of the Court and with the intensity of the politics of the times. For example, in *Uphaus* v. *Wyman*, 360 U. S. 72, sustaining an attempt to compel a witness to divulge the names of participants in a summer political camp, JUSTICE BRENNAN dissented on the ground that "it is patent that there is really no subordinating interest . . . demonstrated on the part of the State." *Id.*, at 106. The majority, however, found that "the governmental interest in self-preservation is sufficiently compelling to subordinate the interest in associational privacy . . . ." *Id.*, at 81. That is to enter the world of "make believe," for New Hampshire, the State involved in *Uphaus*, was never in fear of being overthrown.

II

Today's decision will impede the wide-open and robust dissemination of ideas and counterthought which

a free press both fosters and protects and which is essential to the success of intelligent self-government. Forcing a reporter before a grand jury will have two retarding effects upon the ear and the pen of the press. Fear of exposure will cause dissidents to communicate less openly to trusted reporters. And, fear of accountability will cause editors and critics to write with more restrained pens.

I see no way of making mandatory the disclosure of a reporter's confidential source of the information on which he bases his news story.

The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know. The right to know is crucial to the governing powers of the people, to paraphrase Alexander Meiklejohn. Knowledge is essential to informed decisions.

As Mr. Justice Black said in *New York Times Co.* v. *United States,* 403 U. S. 713, 717 (concurring opinion), "The press was to serve the governed, not the governors. . . . The press was protected so that it could bare the secrets of government and inform the people."

Government has an interest in law and order; and history shows that the trend of rulers—the bureaucracy and the police—is to suppress the radical and his ideas and to arrest him rather than the hostile audience. See *Feiner* v. *New York,* 340 U. S. 315. Yet, as held in *Terminiello* v. *Chicago,* 337 U. S. 1, 4, one "function of free speech under our system of government is to invite dispute." We went on to say, "It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and pre-

conceptions and have profound unsettling effects as it presses for acceptance of an idea."

The people who govern are often far removed from the cabals that threaten the regime; the people are often remote from the sources of truth even though they live in the city where the forces that would undermine society operate. The function of the press is to explore and investigate events, inform the people what is going on, and to expose the harmful as well as the good influences at work. There is no higher function performed under our constitutional regime. Its performance means that the press is often engaged in projects that bring anxiety or even fear to the bureaucracies, departments, or officials of government. The whole weight of government is therefore often brought to bear against a paper or a reporter.

A reporter is no better than his source of information. Unless he has a privilege to withhold the identity of his source, he will be the victim of governmental intrigue or aggression. If he can be summoned to testify in secret before a grand jury, his sources will dry up and the attempted exposure, the effort to enlighten the public, will be ended. If what the Court sanctions today becomes settled law, then the reporter's main function in American society will be to pass on to the public the press releases which the various departments of government issue.

It is no answer to reply that the risk that a newsman will divulge one's secrets to the grand jury is no greater than the threat that he will in any event inform to the police. Even the most trustworthy reporter may not be able to withstand relentless badgering before a grand jury.[10]

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[10] "The secrecy of the [grand jury's] proceedings and the possibility of a jail sentence for contempt so intimidate the witness that he may be led into answering questions which pry into his personal

The record in this case is replete with weighty affidavits from responsible newsmen, telling how important is the sanctity of their sources of information.[11] When we deny newsmen that protection, we deprive the people of the information needed to run the affairs of the Nation in an intelligent way.

Madison said:

> "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." (To W. T. Barry, Aug. 4, 1822.) 9 Writings of James Madison 103 (G. Hunt ed. 1910).

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life and associations and which, in the bargain, are frequently immaterial and vague. Alone and faced by either hostile or apathetic grand juries, the witness is frequently undone by his experience. Life in a relatively open society makes him especially vulnerable to a secret appearance before a body that is considering criminal charges. And the very body toward which he could once look for protection has become a weapon of the prosecution. When he seeks protective guidance from his lawyer he learns that the judicial broadening of due process which has occurred in the past two decades has largely ignored grand jury matters, precisely because it was assumed that the grand jury still functioned as a guardian of the rights of potential defendants." Donner & Cerruti, The Grand Jury Network: How the Nixon Administration Has Secretly Perverted A Traditional Safeguard of Individual Rights, 214 The Nation 5, 6 (1972).

[11] It is said that "we remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury." *Ante*, at 693. But the majority need look no further than its holdings that prosecutors need not disclose informers' names because disclosure would (a) terminate the usefulness of an exposed informant inasmuch as others would no longer confide in him, and (b) it would generally inhibit persons from becoming confidential informers. *McCray* v. *Illinois*, 386 U. S. 300; *Scher* v. *United States*, 305 U. S. 251; cf. *Roviaro* v. *United States*, 353 U. S. 53.

Today's decision is more than a clog upon news gathering. It is a signal to publishers and editors that they should exercise caution in how they use whatever information they can obtain. Without immunity they may be summoned to account for their criticism. Entrenched officers have been quick to crash their powers down upon unfriendly commentators.[12] *E. g., New York Times Co.* v. *Sullivan,* 376 U. S. 254; *Garrison* v. *Louisiana,* 379 U. S. 64; *Pickering* v. *Board of Education,* 391 U. S. 563; *Gravel* v. *United States, ante,* p. 606.

The intrusion of government into this domain is symptomatic of the disease of this society. As the years pass the power of government becomes more and more pervasive. It is a power to suffocate both people and causes. Those in power, whatever their politics, want only to per-

[12] For a summary of early reprisals against the press, such as the John Peter Zenger trial, the Alien and Sedition Acts prosecutions, and Civil War suppression of newspapers, see Press Freedoms Under Pressure, Report of the Twentieth Century Fund Task Force on the Government and the Press 3–5 (1972). We have not outlived the tendency of officials to retaliate against critics. For recent examples see J. Wiggins, Freedom or Secrecy 87 (1956) ("New Mexico, in 1954, furnished a striking example of government reprisal against . . . a teacher in the state reform school [who] wrote a letter to the *New Mexican,* confirming stories it had printed about mistreatment of inmates by guards. . . . [Two days later he] was notified of his dismissal."); Note, The Right of Government Employees to Furnish Information to Congress: Statutory and Constitutional Aspects, 57 Va. L. Rev. 885–886 (1971) (dismissal of an Air Force employee who testified before a Senate committee with respect to C–5A cargo plane cost overruns and firing of an FBI agent who wrote Senators complaining of the Bureau's personnel practices); N. Y. Times, Nov. 8, 1967, p. 1, col. 2; *id.,* Nov. 9, 1967, p. 2, col. 4 (Selective Service directive to local draft boards requiring conscription of those who protested war); N. Y. Times, Nov. 11, 1971, p. 95, col. 4; *id.,* Nov. 12, 1971, p. 13, col. 1; *id.,* Nov. 14, 1971, pt. 4, p. 13, col. 1 (FBI investigation of a television commentator who criticized administration policies); *id.,* Nov. 14, 1971, p. 75, col. 3 (denial of White House press pass to underground journalist).

petuate it. Now that the fences of the law and the tradition that has protected the press are broken down, the people are the victims. The First Amendment, as I read it, was designed precisely to prevent that tragedy.

I would also reverse the judgments in No. 70–85, *Branzburg* v. *Hayes*, and No. 70–94, *In re Pappas*, for the reasons stated in the above dissent in No. 70–57, *United States* v. *Caldwell*.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

The Court's crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in our society. The question whether a reporter has a constitutional right to a confidential relationship with his source is of first impression here, but the principles that should guide our decision are as basic as any to be found in the Constitution. While MR. JUSTICE POWELL's enigmatic concurring opinion gives some hope of a more flexible view in the future, the Court in these cases holds that a newsman has no First Amendment right to protect his sources when called before a grand jury. The Court thus invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government. Not only will this decision impair performance of the press' constitutionally protected functions, but it will, I am convinced, in the long run harm rather than help the administration of justice.

I respectfully dissent.

I

The reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public. It is this basic concern that underlies the Con-

stitution's protection of a free press, *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250; *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269,[1] because the guarantee is "not for the benefit of the press so much as for the benefit of all of us." *Time, Inc.* v. *Hill*, 385 U. S. 374, 389.[2]

Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised,[3] and a free press is thus indispensable to a free society. Not only does the press enhance personal self-fulfillment

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[1] We have often described the process of informing the public as the core purpose of the constitutional guarantee of free speech and a free press. See, *e. g.*, *Stromberg* v. *California*, 283 U. S. 359, 369; *De Jonge* v. *Oregon*, 299 U. S. 353, 365; *Smith* v. *California*, 361 U. S. 147, 153.

[2] As I see it, a reporter's right to protect his source is bottomed on the constitutional guarantee of a full flow of information to the public. A newsman's personal First Amendment rights or the associational rights of the newsman and the source are subsumed under that broad societal interest protected by the First Amendment. Obviously, we are not here concerned with the parochial personal concerns of particular newsmen or informants.

"The newsman-informer relationship is different from . . . other relationships whose confidentiality is protected by statute, such as the attorney-client and physician-patient relationships. In the case of other statutory privileges, the right of nondisclosure is granted to the person making the communication in order that he will be encouraged by strong assurances of confidentiality to seek such relationships which contribute to his personal well-being. The judgment is made that the interests of society will be served when individuals consult physicians and lawyers; the public interest is thus advanced by creating a zone of privacy that the individual can control. However, in the case of the reporter-informer relationship, society's interest is not in the welfare of the informant per se, but rather in creating conditions in which information possessed by news sources can reach public attention." Note, 80 Yale L. J. 317, 343 (1970) (footnotes omitted) (hereinafter Yale Note).

[3] See generally Z. Chafee, Free Speech in the United States (1941); A. Meikeljohn, Free Speech and Its Relation to Self-Government (1948); T. Emerson, Toward a General Theory of the First Amendment (1963).

by providing the people with the widest possible range of fact and opinion, but it also is an incontestable precondition of self-government. The press "has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences . . . ." *Estes* v. *Texas*, 381 U. S. 532, 539; *Mills* v. *Alabama*, 384 U. S. 214, 219; *Grosjean, supra*, at 250. As private and public aggregations of power burgeon in size and the pressures for conformity necessarily mount, there is obviously a continuing need for an independent press to disseminate a robust variety of information and opinion through reportage, investigation, and criticism, if we are to preserve our constitutional tradition of maximizing freedom of choice by encouraging diversity of expression.

A

In keeping with this tradition, we have held that the right to publish is central to the First Amendment and basic to the existence of constitutional democracy. *Grosjean, supra*, at 250; *New York Times, supra*, at 270.

A corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated. We have, therefore, recognized that there is a right to publish without prior governmental approval, *Near* v. *Minnesota*, 283 U. S. 697; *New York Times Co.* v. *United States*, 403 U. S. 713, a right to distribute information, see, *e. g.*, *Lovell* v. *Griffin*, 303 U. S. 444, 452; *Marsh* v. *Alabama*, 326 U. S. 501; *Martin* v. *City of Struthers*, 319 U. S. 141; *Grosjean, supra*, and a right to receive printed matter, *Lamont* v. *Postmaster General*, 381 U. S. 301.

No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist. *Zemel* v. *Rusk*, 381 U. S. 1.[4] Note, The Right of the Press to Gather Information, 71 Col. L. Rev. 838 (1971). As Madison wrote: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." 9 Writings of James Madison 103 (G. Hunt ed. 1910).

B

The right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source. This proposition follows as a matter of simple logic once three factual predicates are recognized: (1) newsmen require informants to gather news; (2) confidentiality—the promise or understanding that names or certain aspects of communications will be kept off the record—is essential to the creation and maintenance of a news-gathering relationship with informants; and (3) an unbridled subpoena power—the absence of a constitutional right protecting, in *any* way, a confidential relationship from compulsory process—will either deter sources from divulging information or deter reporters from gathering and publishing information.

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[4] In *Zemel* v. *Rusk*, 381 U. S. 1, we held that the Secretary of State's denial of a passport for travel to Cuba did not violate a citizen's First Amendment rights. The rule was justified by the "weightiest considerations of national security" and we concluded that the "right to speak and publish does not carry with it the *unrestrained* right to gather information." *Id.*, at 16–17 (emphasis supplied). The necessary implication is that some right to gather information does exist.

It is obvious that informants are necessary to the news-gathering process as we know it today. If it is to perform its constitutional mission, the press must do far more than merely print public statements or publish prepared handouts. Familiarity with the people and circumstances involved in the myriad background activities that result in the final product called "news" is vital to complete and responsible journalism, unless the press is to be a captive mouthpiece of "newsmakers." [5]

It is equally obvious that the promise of confidentiality may be a necessary prerequisite to a productive relationship between a newsman and his informants. An officeholder may fear his superior; a member of the bureaucracy, his associates; a dissident, the scorn of majority opinion. All may have information valuable to the public discourse, yet each may be willing to relate that information only in confidence to a reporter whom he trusts, either because of excessive caution or because of a reasonable fear of reprisals or censure for unorthodox

[5] In *Caldwell* v. *United States*, 434 F. 2d 1081, the Government claimed that Caldwell did not have to maintain a confidential relationship with members of the Black Panther Party and provide independent reporting of their activities, since the Party and its leaders could issue statements on their own. But, as the Court of Appeals for the Ninth Circuit correctly observed:

"[I]t is not enough that Black Panther press releases and public addresses by Panther leaders may continue unabated in the wake of subpoenas such as the one here in question. It is not enough that the public's knowledge of groups such as the Black Panthers should be confined to their deliberate public pronouncements or distant news accounts of their occasional dramatic forays into the public view.

"The need for an untrammeled press takes on special urgency in times of widespread protest and dissent. In such times the First Amendment protections exist to maintain communication with dissenting groups and to provide the public with a wide range of information about the nature of protest and heterodoxy." Citing *Associated Press* v. *United States*, 326 U. S. 1, 20; *Thornhill* v. *Alabama*, 310 U. S. 88, 102. *Id.*, at 1084–1085.

views. The First Amendment concern must not be with the motives of any particular news source, but rather with the conditions in which informants of all shades of the spectrum may make information available through the press to the public. Cf. *Talley* v. *California*, 362 U. S. 60, 65; *Bates* v. *Little Rock*, 361 U. S. 516; *NAACP* v. *Alabama*, 357 U. S. 449.[6]

In *Caldwell*, the District Court found that "confidential relationships . . . are commonly developed and maintained by professional journalists, and are indispensable to their work of gathering, analyzing and publishing the news." [7] Commentators and individual reporters have repeatedly noted the importance of confidentiality.[8]

[6] As we observed in *Talley* v. *California*, 362 U. S. 60, "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. . . . Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. . . . Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes." *Id.*, at 64–65. And in *Lamont* v. *Postmaster General*, 381 U. S. 301, we recognized the importance to First Amendment values of the right to receive information anonymously.

[7] *Application of Caldwell*, 311 F. Supp. 358, 361.

[8] See, *e. g.*, F. Chalmers, A Gentleman of the Press: The Biography of Colonel John Bayne MacLean 74–75 (1969); H. Klurfeld, Behind the Lines: The World of Drew Pearson 50, 52–55 (1968); A. Krock, Memoirs: Sixty Years on the Firing Line 181, 184–185 (1968); E. Larsen, First with the Truth 22–23 (1968); R. Ottley, The Lonely Warrior—The Life and Times of Robert S. Abbott 143–145 (1955); C. Sulzberger, A Long Row of Candles; Memoirs and Diaries 241 (1969).

As Walter Cronkite, a network television reporter, said in an affidavit in *Caldwell:* "In doing my work, I (and those who assist me) depend constantly on information, ideas, leads and opinions received in confidence. Such material is essential in digging out newsworthy facts and, equally important, in assessing the importance and analyzing the significance of public events." App. 52.

And surveys among reporters and editors indicate that the promise of nondisclosure is necessary for many types of news gathering.[9]

Finally, and most important, when governmental officials possess an unchecked power to compel newsmen to disclose information received in confidence, sources will clearly be deterred from giving information, and reporters will clearly be deterred from publishing it, because uncertainty about exercise of the power will lead to "self-censorship." *Smith* v. *California*, 361 U. S. 147, 149–154; *New York Times Co.* v. *Sullivan*, 376 U. S., at 279. The uncertainty arises, of course, because the judiciary has traditionally imposed virtually no limitations on the grand jury's broad investigatory powers. See Antell, The Modern Grand Jury: Benighted Supergovernment, 51 A. B. A. J. 153 (1965). See also Part II, *infra*.

After today's decision, the potential informant can never be sure that his identity or off-the-record communications will not subsequently be revealed through the compelled testimony of a newsman. A public-spirited person inside government, who is not implicated in any crime, will now be fearful of revealing corruption or other governmental wrongdoing, because he will now know he can subsequently be identified by use of compulsory process. The potential source must, therefore, choose between risking exposure by giving information or avoiding the risk by remaining silent.

The reporter must speculate about whether contact with a controversial source or publication of controversial material will lead to a subpoena. In the event of a

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[9] See Guest & Stanzler, The Constitutional Argument for Newsmen Concealing Their Sources, 64 Nw. U. L. Rev. 18 (1969); V. Blasi, Press Subpoenas: An Empirical and Legal Analysis, Study Report of the Reporters' Committee on Freedom of the Press 20–29 (hereinafter Blasi).

subpoena, under today's decision, the newsman will know that he must choose between being punished for contempt if he refuses to testify, or violating his profession's ethics [10] and impairing his resourcefulness as a reporter if he discloses confidential information.[11]

Again, the commonsense understanding that such deterrence will occur is buttressed by concrete evidence. The existence of deterrent effects through fear and self-censorship was impressively developed in the District Court in *Caldwell*.[12] Individual reporters [13] and commentators [14] have noted such effects. Surveys have verified that an unbridled subpoena power will substan-

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[10] The American Newspaper Guild has adopted the following rule as part of the newsman's code of ethics: "[N]ewspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigating bodies." G. Bird & F. Merwin, The Press and Society 592 (1971).

[11] Obviously, if a newsman does not honor a confidence he will have difficulty establishing other confidential relationships necessary for obtaining information in the future. See Siebert & Ryniker, Press Winning Fight to Guard Sources, Editor & Publisher, Sept. 1, 1934, pp. 9, 36–37.

[12] The court found that "compelled disclosure of information received by a journalist within the scope of . . . confidential relationships jeopardizes those relationships and thereby impairs the journalist's ability to gather, analyze and publish the news." *Application of Caldwell*, 311 F. Supp., at 361.

[13] See n. 8, *supra*.

[14] Recent commentary is nearly unanimous in urging either an absolute or qualified newsman's privilege. See, *e. g.*, Goldstein, Newsmen and Their Confidential Sources, New Republic, Mar. 21, 1970, pp. 13–14; Yale Note, *supra*, n. 2; Comment, 46 N. Y. U. L. Rev. 617 (1971); Nelson, The Newsmen's Privilege Against Disclosure of Confidential Sources and Information, 24 Vand. L. Rev. 667 (1971); Note, The Right of the Press to Gather Information, 71 Col. L. Rev. 838 (1971); Comment, 4 U. Mich. J. L. Ref. 85 (1970); Comment, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 119 (1970); Comment, The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation, 58 Calif. L. Rev. 1198 (1970). But see the Court's opinion, *ante*,

tially impair the flow of news to the public, especially in sensitive areas involving governmental officials, financial affairs, political figures, dissidents, or minority groups that require in-depth, investigative reporting.[15] And the Justice Department has recognized that "compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights."[16] *No* evidence contradicting the existence of such deterrent effects was offered at the trials or in the briefs here by the petitioner in *Caldwell* or by the respondents in *Branzburg* and *Pappas*.

The impairment of the flow of news cannot, of course, be proved with scientific precision, as the Court seems to demand. Obviously, not every news-gathering relationship requires confidentiality. And it is difficult to pinpoint precisely how many relationships do require a promise or understanding of nondisclosure. But we have never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist; we have never before required proof of the exact number of people potentially affected by governmental action, who would actually be dissuaded from engaging in First Amendment activity.

Rather, on the basis of common sense and available information, we have asked, often implicitly, (1) whether there was a rational connection between the cause (the governmental action) and the effect (the deterrence or

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at 690 n. 29. And see generally articles collected in Yale Note, *supra*, n. 2.

Recent decisions are in conflict both as to the importance of the deterrent effects and, *a fortiori*, as to the existence of a constitutional right to a confidential reporter-source relationship. See the Court's opinion, *ante*, at 686, and cases collected in Yale Note, at 318 nn. 6–7.

[15] See Blasi 6–71; Guest & Stanzler, *supra*, n. 9, at 43–50.

[16] Department of Justice Memo. No. 692 (Sept. 2, 1970).

impairment of First Amendment activity), and (2) whether the effect would occur with some regularity, *i. e.*, would not be *de minimis*. See, *e. g.*, *Grosjean* v. *American Press Co.*, 297 U. S., at 244–245; *Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 503; *Sweezy* v. *New Hampshire*, 354 U. S. 234, 248 (plurality opinion); *NAACP* v. *Alabama*, 357 U. S., at 461–466; *Smith* v. *California*, 361 U. S., at 150–154; *Bates* v. *Little Rock*, 361 U. S., at 523–524; *Talley* v. *California*, 362 U. S., at 64–65; *Shelton* v. *Tucker*, 364 U. S. 479, 485–486; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 286; *NAACP* v. *Button*, 371 U. S. 415, 431–438; *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539, 555–557; *New York Times Co.* v. *Sullivan*, 376 U. S., at 277–278; *Freedman* v. *Maryland*, 380 U. S. 51, 59; *DeGregory* v. *New Hampshire Attorney General*, 383 U. S. 825; *Elfbrandt* v. *Russell*, 384 U. S. 11, 16–19. And, in making this determination, we have shown a special solicitude towards the "indispensable liberties" protected by the First Amendment, *NAACP* v. *Alabama*, *supra*, at 461; *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 66, for "[f]reedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates*, *supra*, at 523.[17] Once this threshold inquiry has been satisfied, we have then examined the competing interests in determining whether

[17] Although, as the Court points out, we have held that the press is not free from the requirements of the National Labor Relations Act, the Fair Labor Standards Act, the antitrust laws, or nondiscriminatory taxation, *ante*, at 683, these decisions were concerned "only with restraints on certain business or commercial practices" of the press. *Citizen Publishing Co.* v. *United States*, 394 U. S. 131, 139. And due weight was given to First Amendment interests. For example, "The First Amendment, far from providing an argument against application of the Sherman Act . . . provides powerful reasons to the contrary." *Associated Press* v. *United States*, 326 U. S., at 20.

there is an unconstitutional infringement of First Amendment freedoms.

For example, in *NAACP* v. *Alabama, supra,* we found that compelled disclosure of the names of those in Alabama who belonged to the NAACP "is likely to affect adversely the ability [of the NAACP] and its members to pursue their . . . beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." *Id.,* at 462–463. In *Talley, supra,* we held invalid a city ordinance that forbade circulation of any handbill that did not have the distributor's name on it, for there was "no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." *Id.,* at 64. And in *Burstyn, Inc., supra,* we found deterrence of First Amendment activity inherent in a censor's power to exercise unbridled discretion under an overbroad statute. *Id.,* at 503.

Surely the analogous claim of deterrence here is as securely grounded in evidence and common sense as the claims in the cases cited above, although the Court calls the claim "speculative." See *ante,* at 694. The deterrence may not occur in every confidential relationship between a reporter and his source.[18] But it will cer-

[18] The fact that *some* informants will not be deterred from giving information by the prospect of the unbridled exercise of the subpoena power only means that there will not *always* be a conflict between the grand jury's inquiry and the protection of First Amendment activities. But even if the percentage of such informants is relatively large compared to the total "universe" of potential informants, there will remain a large number of people in "absolute" terms who *will* be deterred, and the flow of news through mass circulation newspapers and electronic media will inevitably be impaired.

tainly occur in certain types of relationships involving sensitive and controversial matters. And such relationships are vital to the free flow of information.

To require any greater burden of proof is to shirk our duty to protect values securely embedded in the Constitution. We cannot await an unequivocal—and therefore unattainable—imprimatur from empirical studies.[19] We can and must accept the evidence developed in the record, and elsewhere, that overwhelmingly supports the premise that deterrence will occur with regularity in important types of news-gathering relationships.[20]

Thus, we cannot escape the conclusion that when neither the reporter nor his source can rely on the shield of confidentiality against unrestrained use of the grand jury's subpoena power, valuable information will not be published and the public dialogue will inevitably be impoverished.

II

Posed against the First Amendment's protection of the newsman's confidential relationships in these cases is society's interest in the use of the grand jury to ad-

[19] Empirical studies, after all, can only provide facts. It is the duty of courts to give legal significance to facts; and it is the special duty of this Court to understand the constitutional significance of facts. We must often proceed in a state of less than perfect knowledge, either because the facts are murky or the methodology used in obtaining the facts is open to question. It is then that we must look to the Constitution for the values that inform our presumptions. And the importance to our society of the full flow of information to the public has buttressed this Court's historic presumption in favor of First Amendment values.

[20] See, *e. g.*, the uncontradicted evidence presented in affidavits from newsmen in *Caldwell*, Appendix to No. 70-57, pp. 22-61 (statements from Gerald Fraser, Thomas Johnson, John Kifner, Timothy Knight, Nicholas Proffitt, Anthony Ripley, Wallace Turner, Gilbert Noble, Anthony Lukas, Martin Arnold, David Burnham, Jon Lowell, Frank Morgan, Min Yee, Walter Cronkite, Eric Sevareid, Mike Wallace, Dan Rather, Marvin Kalb).

minister justice fairly and effectively. The grand jury serves two important functions: "to examine into the commission of crimes" and "to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will." *Hale* v. *Henkel*, 201 U. S. 43, 59. And to perform these functions the grand jury must have available to it every man's relevant evidence. See *Blair* v. *United States*, 250 U. S. 273, 281; *Blackmer* v. *United States*, 284 U. S. 421, 438.

Yet the longstanding rule making every person's evidence available to the grand jury is not absolute. The rule has been limited by the Fifth Amendment,[21] the Fourth Amendment,[22] and the evidentiary privileges of the common law.[23] So it was that in *Blair*, *supra*, after recognizing that the right against compulsory self-incrimination prohibited certain inquiries, the Court noted that "some confidential matters are shielded from considerations of policy, and perhaps in other cases for *special reasons* a witness may be excused from telling all that he knows." *Id.*, at 281 (emphasis supplied). And in *United States* v. *Bryan*, 339 U. S. 323, the Court observed that any exemption from the duty to testify before the grand jury "presupposes a very real interest to be protected." *Id.*, at 332.

Such an interest must surely be the First Amendment protection of a confidential relationship that I have discussed above in Part I. As noted there, this protection does not exist for the purely private interests of the

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[21] See *Blau* v. *United States*, 340 U. S. 159; *Quinn* v. *United States*, 349 U. S. 155; *Curcio* v. *United States*, 354 U. S. 118; *Malloy* v. *Hogan*, 378 U. S. 1.

[22] See *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385.

[23] See Committee on Rules of Practice and Procedure of Judicial Conference of the United States, Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates (1971); 8 J. Wigmore, Evidence §§ 2290–2391 (McNaughton rev. 1961).

newsman or his informant, nor even, at bottom, for the First Amendment interests of either partner in the newsgathering relationship.[24] Rather, it functions to insure nothing less than democratic decisionmaking through the free flow of information to the public, and it serves, thereby, to honor the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S., at 270.

In striking the proper balance between the public interest in the efficient administration of justice and the First Amendment guarantee of the fullest flow of information, we must begin with the basic proposition that because of their "delicate and vulnerable" nature, *NAACP* v. *Button*, 371 U. S., at 433, and their transcendent importance for the just functioning of our society, First Amendment rights require special safeguards.

A

This Court has erected such safeguards when government, by legislative investigation or other investigative means, has attempted to pierce the shield of privacy inherent in freedom of association.[25] In no previous case have we considered the extent to which the First Amendment limits the grand jury subpoena power. But the

[24] Although there is a longstanding presumption against creation of common-law testimonial privileges, *United States* v. *Bryan*, 339 U. S. 323, these privileges are grounded in an "individual interest which has been found . . . to outweigh the public interest in the search for truth" rather than in the broad public concerns that inform the First Amendment. *Id.*, at 331.

[25] The protection of information from compelled disclosure for broad purposes of public policy has been recognized in decisions involving police informers, see *Roviaro* v. *United States*, 353 U. S. 53, *United States* v. *Ventresca*, 380 U. S. 102, 108, *Aguilar* v. *Texas*, 378 U. S. 108, 114, *McCray* v. *Illinois*, 386 U. S. 300, and military and state secrets, *United States* v. *Reynolds*, 345 U. S. 1.

Court has said that "[t]he Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press . . . or political belief and association be abridged." *Watkins* v. *United States,* 354 U. S. 178, 188. And in *Sweezy* v. *New Hampshire* it was stated: "It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas." 354 U. S., at 245 (plurality opinion).

The established method of "carefully" circumscribing investigative powers is to place a heavy burden of justification on government officials when First Amendment rights are impaired. The decisions of this Court have "consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *NAACP* v. *Button,* 371 U. S., at 438. And "it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly *show a substantial relation between the information sought and a subject of overriding and compelling state interest.*" *Gibson* v. *Florida Legislative Investigation Committee,* 372 U. S., at 546 (emphasis supplied). See also *DeGregory* v. *Attorney General of New Hampshire,* 383 U. S. 825; *NAACP* v. *Alabama,* 357 U. S. 449; *Sweezy, supra; Watkins, supra.*

Thus, when an investigation impinges on First Amendment rights, the government must not only show that

the inquiry is of "compelling and overriding importance" but it must also "convincingly" demonstrate that the investigation is "substantially related" to the information sought.

Governmental officials must, therefore, demonstrate that the information sought is *clearly* relevant to a *precisely* defined subject of governmental inquiry. *Watkins, supra; Sweezy, supra.*[26] They must demonstrate that it is reasonable to think the witness in question has that information. *Sweezy, supra; Gibson, supra.*[27] And they must show that there is not any means of obtaining the information less destructive of First Amendment liberties. *Shelton* v. *Tucker,* 364 U. S., at 488; *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U. S. 293, 296–297.[28]

These requirements, which we have recognized in decisions involving legislative and executive investigations, serve established policies reflected in numerous First

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[26] As we said in *Watkins* v. *United States,* 354 U. S. 178,

"[W]hen First Amendment rights are threatened, the delegation of power to the [legislative] committee must be clearly revealed in its charter." "It is the responsibility of the Congress . . . to insure that compulsory process is used only in furtherance of a legislative purpose. That requires that the instructions to an investigating committee spell out the group's jurisdiction and purpose with sufficient particularity. . . . The more vague the committee's charter is, the greater becomes the possibility that the committee's specific actions are not in conformity with the will of the parent House of Congress." *Id.,* at 198, 201.

[27] We noted in *Sweezy* v. *New Hampshire,* 354 U. S. 234:

"The State Supreme Court itself recognized that there was a weakness in its conclusion that the menace of forcible overthrow of the government justified sacrificing constitutional rights. There was a missing link in the chain of reasoning. The syllogism was not complete. *There was nothing to connect the questioning of petitioner with this fundamental interest of the State.*" *Id.,* at 251 (emphasis supplied).

[28] See generally Note, Less Drastic Means and the First Amendment, 78 Yale L. J. 464 (1969).

Amendment decisions arising in other contexts. The requirements militate against vague investigations that, like vague laws, create uncertainty and needlessly discourage First Amendment activity.[29] They also insure that a legitimate governmental purpose will not be pursued by means that "broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton, supra,* at 488.[30] As we said in *Gibson, supra,* "Of course, a legislative investigation—as any investigation—must proceed 'step by step,' . . . but step by step or in totality, an adequate foundation for inquiry must be laid before proceeding in such a manner as will substantially intrude upon and severely curtail or inhibit constitutionally protected activities or seriously interfere with similarly protected associational rights." 372 U. S., at 557.

I believe the safeguards developed in our decisions involving governmental investigations must apply to the grand jury inquiries in these cases. Surely the function of the grand jury to aid in the enforcement of the law is no more important than the function of the legislature, and its committees, to make the law. We have long recognized the value of the role played by legislative investigations, see, *e. g., United States* v. *Rumely,*

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[29] See *Watkins, supra,* at 208–209. See generally *Baggett* v. *Bullitt,* 377 U. S. 360, 372; *Speiser* v. *Randall,* 357 U. S. 513, 526; *Ashton* v. *Kentucky,* 384 U. S. 195, 200–201; *Dombrowski* v. *Pfister,* 380 U. S. 479, 486; *Smith* v. *California,* 361 U. S., at 150–152; *Winters* v. *New York,* 333 U. S. 507; *Stromberg* v. *California,* 283 U. S., at 369. See also Note, The Chilling Effect in Constitutional Law, 69 Col. L. Rev. 808 (1969).

[30] See generally *Zwickler* v. *Koota,* 389 U. S. 241, 249–250, and cases cited therein; *Coates* v. *Cincinnati,* 402 U. S. 611, 616; *Cantwell* v. *Connecticut,* 310 U. S. 296, 307; *De Jonge* v. *Oregon,* 299 U. S., at 364–365; *Schneider* v. *State,* 308 U. S. 147, 164; *Cox* v. *Louisiana,* 379 U. S. 559, 562–564. Cf. *NAACP* v. *Button,* 371 U. S. 415, 438. See also Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970).

345 U. S. 41, 43; *Barenblatt* v. *United States,* 360 U. S. 109, 111–112, for the "power of the Congress to conduct investigations is inherent . . . [encompassing] surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them." *Watkins, supra,* at 187. Similarly, the associational rights of private individuals, which have been the prime focus of our First Amendment decisions in the investigative sphere, are hardly more important than the First Amendment rights of mass circulation newspapers and electronic media to disseminate ideas and information, and of the general public to receive them. Moreover, the vices of vagueness and overbreadth that legislative investigations may manifest are also exhibited by grand jury inquiries, since grand jury investigations are not limited in scope to specific criminal acts, see, *e. g., Wilson* v. *United States,* 221 U. S. 361, *Hendricks* v. *United States,* 223 U. S. 178, 184, *United States* v. *Johnson,* 319 U. S. 503, and since standards of materiality and relevance are greatly relaxed. *Holt* v. *United States,* 218 U. S. 245; *Costello* v. *United States,* 350 U. S. 359. See generally Note, The Grand Jury as an Investigatory Body, 74 Harv. L. Rev. 590, 591–592 (1961).[31] For, as the United States notes in its brief in *Caldwell,* the

[31] In addition, witnesses customarily are not allowed to object to questions on the grounds of materiality or relevance, since the scope of the grand jury inquiry is deemed to be of no concern to the witness. *Carter* v. *United States,* 417 F. 2d 384, cert. denied, 399 U. S. 935. Nor is counsel permitted to be present to aid a witness. See *In re Groban,* 352 U. S. 330.

See generally Younger, The Grand Jury Under Attack, pt. 3, 46 J. Crim. L. C. & P. S. 214 (1955); Recent Cases, 104 U. Pa. L. Rev. 429 (1955); Watts, Grand Jury: Sleeping Watchdog or Expensive Antique, 37 N. C. L. Rev. 290 (1959); Whyte, Is the Grand Jury Necessary?, 45 Va. L. Rev. 461 (1959); Note, 2 Col. J. Law & Soc. Prob. 47, 58 (1966); Antell, The Modern Grand Jury: Benighted Supergovernment, 51 A. B. A. J. 153 (1965); Orfield, The Federal Grand Jury, 22 F. R. D. 343.

grand jury "need establish no factual basis for commencing an investigation, and can pursue rumors which further investigation may prove groundless."

Accordingly, when a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law;[32] (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.[33]

This is not to say that a grand jury could not issue a subpoena until such a showing were made, and it is not to say that a newsman would be in any way privileged to ignore any subpoena that was issued. Obviously, before the government's burden to make such a showing were triggered, the reporter would have to move to quash the subpoena, asserting the basis on which he considered the particular relationship a confidential one.

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[32] The standard of proof employed by most grand juries, federal and State, is simply "probable cause" to believe that the accused has committed a crime. See Note, 1963 Wash. U. L. Q. 102; L. Hall et al., Modern Criminal Procedure 793–794 (1969). Generally speaking, it is extremely difficult to challenge indictments on the ground that they are not supported by adequate or competent evidence. Cf. *Costello* v. *United States,* 350 U. S. 359; *Beck* v. *Washington,* 369 U. S. 541.

[33] Cf. *Garland* v. *Torre,* 259 F. 2d 545. The Court of Appeals for the Second Circuit declined to provide a testimonial privilege to a newsman called to testify at a civil trial. But the court recognized a newsman's First Amendment right to a confidential relationship with his source and concluded: "It is to be noted that we are not dealing here with the use of the judicial process to force a wholesale disclosure of a newspaper's confidential sources of news, nor with a case where the identity of the news source is of doubtful relevance or materiality. . . . The question asked . . . went to the heart of the plaintiff's claim." *Id.,* at 549–550 (citations omitted).

B

The crux of the Court's rejection of any newsman's privilege is its observation that only "where news sources themselves are implicated in crime or possess information *relevant* to the grand jury's task need they or the reporter be concerned about grand jury subpoenas." See *ante*, at 691 (emphasis supplied). But this is a most misleading construct. For it is obviously not true that the only persons about whom reporters will be forced to testify will be those "confidential informants involved in actual criminal conduct" and those having "information suggesting illegal conduct by others." See *ante*, at 691, 693. As noted above, given the grand jury's extraordinarily broad investigative powers and the weak standards of relevance and materiality that apply during such inquiries, reporters, if they have no testimonial privilege, will be called to give information about informants who have neither committed crimes nor have information about crime. It is to avoid deterrence of such sources and thus to prevent needless injury to First Amendment values that I think the government must be required to show probable cause that the newsman has information that is clearly relevant to a specific probable violation of criminal law.[34]

[34] If this requirement is not met, then the government will basically be allowed to undertake a "fishing expedition" at the expense of the press. Such general, exploratory investigations will be most damaging to confidential news-gathering relationships, since they will create great uncertainty in both reporters and their sources. The Court sanctions such explorations, by refusing to apply a meaningful "probable cause" requirement. See *ante*, at 701–702. As the Court states, a grand jury investigation "may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors." *Ante*, at 701. It thereby invites government to try to annex the press as an investigative arm, since any time government wants to probe the relationships between the

Similarly, a reporter may have information from a confidential source that is "related" to the commission of crime, but the government may be able to obtain an indictment or otherwise achieve its purposes by subpoenaing persons other than the reporter. It is an obvious but important truism that when government aims have been fully served, there can be no legitimate reason to disrupt a confidential relationship between a reporter and his source. To do so would not aid the administration of justice and would only impair the flow of information to the public. Thus, it is to avoid deterrence of such sources that I think the government must show that there are no alternative means for the grand jury to obtain the information sought.

Both the "probable cause" and "alternative means" requirements would thus serve the vital function of mediating between the public interest in the administration of justice and the constitutional protection of the full flow of information. These requirements would avoid a direct conflict between these competing concerns, and they would generally provide adequate protection for newsmen. See Part III, *infra*.[35] No doubt the courts would be required to make some delicate judgments in working out this accommodation. But that, after all,

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newsman and his source, it can, on virtually any pretext, convene a grand jury and compel the journalist to testify.

The Court fails to recognize that under the guise of "investigating crime" vindictive prosecutors can, using the broad powers of the grand jury which are, in effect, immune from judicial supervision, explore the newsman's sources at will, with no serious law enforcement purpose. The secrecy of grand jury proceedings affords little consolation to a news source; the prosecutor obviously will, in most cases, have knowledge of testimony given by grand jury witnesses.

[35] We need not, therefore, reach the question of whether government's interest in these cases is "overriding and compelling." I do not, however, believe, as the Court does, that *all* grand jury investigations automatically would override the newsman's testimonial privilege.

is the function of courts of law. Better such judgments, however difficult, than the simplistic and stultifying absolutism adopted by the Court in denying any force to the First Amendment in these cases.[36]

The error in the Court's absolute rejection of First Amendment interests in these cases seems to me to be most profound. For in the name of advancing the administration of justice, the Court's decision, I think, will only impair the achievement of that goal. People entrusted with law enforcement responsibility, no less than private citizens, need general information relating to controversial social problems. Obviously, press reports have great value to government, even when the newsman cannot be compelled to testify before a grand jury. The sad paradox of the Court's position is that when a grand jury may exercise an unbridled subpoena power, and sources involved in sensitive matters become fearful of disclosing information, the newsman will not only cease to be a useful grand jury witness; he will cease to investigate and publish information about issues of public import. I cannot subscribe to such an anomalous result, for, in my view, the interests protected by the First Amendment are not antagonistic to the administration of justice. Rather, they can, in the long run, only be complementary, and for that reason must be given great "breathing space." *NAACP* v. *Button*, 371 U. S., at 433.

III

In deciding what protection should be given to information a reporter receives in confidence from a news source, the Court of Appeals for the Ninth Circuit affirmed the holding of the District Court that the grand

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[36] The disclaimers in MR. JUSTICE POWELL'S concurring opinion leave room for the hope that in some future case the Court may take a less absolute position in this area.

jury power of testimonial compulsion must not be exercised in a manner likely to impair First Amendment interests "until there has been a clear showing of a compelling and overriding national interest that cannot be served by any alternative means." *Caldwell* v. *United States,* 434 F. 2d 1081, 1086. It approved the request of respondent Caldwell for specification by the government of the "subject, direction or scope of the Grand Jury inquiry." *Id.,* at 1085. And it held that in the circumstances of this case Caldwell need not divulge confidential information.

I think this decision was correct. On the record before us the United States has not met the burden that I think the appropriate newsman's privilege should require.

In affidavits before the District Court, the United States said it was investigating possible violations of 18 U. S. C. § 871 (threats against the President), 18 U. S. C. § 1751 (assassination, attempts to assassinate, conspiracy to assassinate the President), 18 U. S. C. § 231 (civil disorders), 18 U. S. C. § 2101 (interstate travel to incite a riot), 18 U. S. C. § 1341 (mail fraud and swindles) and other crimes that were not specified. But, with one exception, there has been no factual showing in this case of the probable commission of, or of attempts to commit, any crimes.[37] The single exception relates to the allegation that a Black Panther Party leader, David Hilliard, violated 18 U. S. C. § 871 during the course of a speech in November 1969. But Caldwell was subpoenaed two months after an indictment was returned against Hilliard, and that charge could not, subsequent to the indictment, be investigated by a grand jury. See *In re National Window Glass Workers,* 287 F. 219; *United*

[37] See Blasi 61 *et seq.*

States v. *Dardi*, 330 F. 2d 316, 336.[38] Furthermore, the record before us does not show that Caldwell probably had any information about the violation of any other federal criminal laws,[39] or that alternative

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[38] After Caldwell was first subpoenaed to appear before the grand jury, the Government did undertake, by affidavits, to "set forth facts indicating the general nature of the grand jury's investigation [and] witness Earl Caldwell's possession of information relevant to this general inquiry." In detailing the basis for the belief that a crime had probably been committed, the Government simply asserted that certain actions had previously been taken *by other grand juries, and by Government counsel*, with respect to certain members of the Black Panther Party (*i. e.*, immunity grants for certain Black Panthers were sought; the Government moved to compel party members to testify before grand juries; and contempt citations were sought when party members refused to testify). No facts were asserted suggesting the actual commission of crime. The exception, as noted, involved David Hilliard's speech and its republication in the party newspaper, the Black Panther, for which Hilliard had been indicted before Caldwell was subpoenaed.

[39] In its affidavits, the Government placed primary reliance on certain articles published by Caldwell in the New York Times during 1969 (on June 15, July 20, July 22, July 27, and Dec. 14). On Dec. 14, 1969, Caldwell wrote:

" 'We are special,' Mr. Hilliard said recently 'We advocate the very direct overthrow of the Government by way of force and violence. By picking up guns and moving against it because we recognize it as being oppressive and in recognizing that we know that the only solution to it is armed struggle.'

"In their role as the vanguard in a revolutionary struggle, the Panthers have picked up guns.

"Last week two of their leaders were killed during the police raid on one of their offices in Chicago. And in Los Angeles a few days earlier, three officers and three Panthers were wounded in a similar shooting incident. In these and in some other raids, the police have found caches of weapons, including high-powered rifles." App. in No. 70–57, p. 13.

In my view, this should be read as indicating that Caldwell had interviewed Panther leaders. It does not indicate that he *probably* had knowledge of the crimes being investigated by the Government. And, to repeat, to the extent it does relate to Hilliard's threat, an

means of obtaining the desired information were pursued.[40]

In the *Caldwell* case, the Court of Appeals further found that Caldwell's confidential relationship with the leaders of the Black Panther Party would be impaired if he appeared before the grand jury at all to answer questions, even though not privileged. *Caldwell* v. *United States,* 434 F. 2d, at 1088. On the particular facts before it,[41] the court concluded that the very

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indictment had already been brought in that matter. The other articles merely demonstrate that Black Panther Party leaders had told Caldwell their ideological beliefs—beliefs that were readily available to the Government through other sources, like the party newspaper.

[40] The Government did not attempt to show that means less impinging upon First Amendment interests had been pursued.

[41] In an affidavit filed with the District Court, Caldwell stated:

"I began covering and writing articles about the Black Panthers almost from the time of their inception, and I myself found that in those first months . . . they were very brief and reluctant to discuss any substantive matter with me. However, as they realized I could be trusted and that my sole purpose was to collect my information and present it objectively in the newspaper and that I had no other motive, I found that not only were the party leaders available for in-depth interviews but also the rank and file members were cooperative in aiding me in the newspaper stories that I wanted to do. During the time that I have been covering the party, I have noticed other newspapermen representing legitimate organizations in the news media being turned away because they were not known and trusted by the party leadership.

"As a result of the relationship that I have developed, I have been able to write lengthy stories about the Panthers that have appeared in The New York Times and have been of such a nature that other reporters who have not known the Panthers have not been able to write. Many of these stories have appeared in up to 50 or 60 other newspapers around the country.

"The Black Panther Party's method of operation with regard to members of the press is significantly different from that of other organizations. For instance, press credentials are not recognized as being of any significance. In addition, interviews are not normally designated as being 'backgrounders' or 'off the record' or 'for

appearance by Caldwell before the grand jury would jeopardize his relationship with his sources, leading to a severance of the news-gathering relationship and impairment of the flow of news to the public: [42]

> "Appellant asserted in affidavit that there is nothing to which he could testify (beyond that which he has already made public and for which, therefore, his appearance is unnecessary) that is not protected by the District Court's order. If this is true—and the Government apparently has not believed it necessary to dispute it—appellant's response to the subpoena would be a barren perform-

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publication' or 'on the record.' Because no substantive interviews are given until a relationship of trust and confidence is developed between the Black Panther Party members and a reporter, statements are rarely made to such reporters on an expressed 'on' or 'off' the record basis. Instead, an understanding is developed over a period of time between the Black Panther Party members and the reporter as to matters which the Black Panther Party wishes to disclose for publications and those matters which are given in confidence. . . . Indeed, if I am forced to appear in secret grand jury proceedings, my appearance alone would be interpreted by the Black Panthers and other dissident groups as a possible disclosure of confidences and trusts and would similarly destroy my effectiveness as a newspaperman."

The Government did not contradict this affidavit.

[42] "Militant groups might very understandably fear that, under the pressure of examination before a Grand Jury, the witness may fail to protect their confidences . . . . The Government characterizes this anticipated loss of communication as Black Panther reprisal . . . . But it is not an extortionate threat we face. It is human reaction as reasonable to expect as that a client will leave his lawyer when his confidence is shaken. . . . As the Government points out, loss of such a sensitive news source can also result from its reaction to indiscreet or unfavorable reporting or from a reporter's association with Government agents or persons disapproved of by the news source. Loss in such a case, however, results from an exercise of the choice and prerogative of a free press. It is not the result of Government compulsion." *Caldwell* v. *United States*, 434 F. 2d, at 1088.

ance—one of no benefit to the Grand Jury. To destroy appellant's capacity as news gatherer for such a return hardly makes sense. Since the cost to the public of excusing his attendance is so slight, it may be said that there is here no public interest of real substance in competition with the First Amendment freedoms that are jeopardized.

"If any competing public interest is ever to arise in a case such as this (where First Amendment liberties are threatened by mere appearance at a Grand Jury investigation) it will be on an occasion in which the witness, armed with his privilege, can still serve a useful purpose before the Grand Jury. Considering the scope of the privilege embodied in the protective order, these occasions would seem to be unusual. It is not asking too much of the Government to show that such an occasion is presented here." *Id.*, at 1089.

I think this ruling was also correct in light of the particularized circumstances of the *Caldwell* case. Obviously, only in very rare circumstances would a confidential relationship between a reporter and his source be so sensitive that mere appearance before the grand jury by the newsman would substantially impair his news-gathering function. But in this case, the reporter made out a prima facie case that the flow of news to the public would be curtailed. And he stated, without contradiction, that the only nonconfidential material about which he could testify was already printed in his newspaper articles.[43] Since the United States has not attempted to

[43] Caldwell stated in his affidavit filed with the District Court, see n. 40, *supra:*

"It would be virtually impossible for me to recall whether any particular matter disclosed to me by members of the Black Panther Party since January 1, 1969, was based on an understanding that it would or would not be confidential. Generally, those matters which were made on a nonconfidential or 'for publication' basis have been

refute this assertion, the appearance of Caldwell would, on these facts, indeed be a "barren performance." But *this* aspect of the *Caldwell* judgment I would confine to its own facts. As the Court of Appeals appropriately observed: "[T]he rule of this case is a narrow one. . . ." *Caldwell, supra,* at 1090.

Accordingly, I would affirm the judgment of the Court of Appeals in No. 70–57, *United States* v. *Caldwell.*[44] In the other two cases before us, No. 70–85, *Branzburg* v. *Hayes* and *Meigs,* and No. 70–94, *In re Pappas,* I would vacate the judgments and remand the cases for further proceedings not inconsistent with the views I have expressed in this opinion.

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published in articles I have written in The New York Times; conversely, any matters which I have not thus far disclosed in published articles would have been given to me based on the understanding that they were confidential and would not be published."

[44] The District Court reserved jurisdiction to modify its order on a showing of a governmental interest which cannot be served by means other than Caldwell's grand jury testimony. The Government would thus have further opportunity in that court to meet the burden that, I think, protection of First Amendment rights requires.

Syllabus

KLEINDIENST, ATTORNEY GENERAL, ET AL. *v.* MANDEL ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

No. 71–16. Argued April 18, 1972—Decided June 29, 1972

This action was brought to compel the Attorney General to grant a temporary nonimmigrant visa to a Belgian journalist and Marxian theoretician whom the American plaintiff-appellees had invited to participate in academic conferences and discussions in this country. The alien had been found ineligible for admission under §§ 212 (a) (28) (D) and (G) (v) of the Immigration and Nationality Act of 1952, barring those who advocate or publish "the economic, international, and governmental doctrines of world communism." The Attorney General had declined to waive ineligibility as he has the power to do under § 212 (d) of the Act, basing his decision on unscheduled activities engaged in by the alien on a previous visit to the United States, when a waiver was granted. A three-judge District Court, although holding that the alien had no personal entry right, concluded that citizens of this country had a First Amendment right to have him enter and to hear him, and enjoined enforcement of § 212 as to this alien. *Held:* In the exercise of Congress' plenary power to exclude aliens or prescribe the conditions for their entry into this country, Congress in § 212 (a) (28) of the Act has delegated conditional exercise of this power to the Executive Branch. When, as in this case, the Attorney General decides for a legitimate and bona fide reason not to waive the statutory exclusion of an alien, courts will not look behind his decision or weigh it against the First Amendment interests of those who would personally communicate with the alien. Pp. 761–770.

325 F. Supp. 620, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 770. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 774.

Deputy Solicitor General Friedman argued the cause for appellants. On the briefs were *Solicitor General Griswold, Assistant Attorney General Mardian, A. Raymond Randolph, Jr., Robert L. Keuch, Edward S. Christenbury,* and *Lee B. Anderson.*

Leonard B. Boudin argued the cause for appellees. With him on the brief were *Victor Rabinowitz* and *David Rosenberg.*

David Carliner and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The appellees have framed the issue here as follows:

> "Does appellants' action in refusing to allow an alien scholar to enter the country to attend academic meetings violate the First Amendment rights of American scholars and students who had invited him?" [1]

Expressed in statutory terms, the question is whether §§ 212 (a)(28)(D) and (G)(v) and § 212 (d)(3)(A) of the Immigration and Nationality Act of 1952, 66 Stat. 182, 8 U. S. C. §§ 1182 (a)(28)(D) and (G)(v) and § 1182 (d)(3)(A), providing that certain aliens "shall be ineligible to receive visas and shall be excluded from admission into the United States" unless the Attorney General, in his discretion, upon recommendation by the Secretary of State or a consular officer, waives inadmissibility and approves temporary admission, are unconstitutional as applied here in that they deprive American citizens of freedom of speech guaranteed by the First Amendment.

[1] Brief for Appellees 1.

The challenged provisions of the statute are:

> "Section 212 (a). Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
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> . . . . . .
>
> "(28) Aliens who are, or at any time have been, members of any of the following classes:
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> . . . . . .
>
> "(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship . . . .
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> . . . . . .
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> "(G) Aliens who write or publish . . . (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship; . . .
>
> "(d)
>
> . . . . . .
>
> "(3) Except as provided in this subsection, an alien (A) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under one or more of the paragraphs enumerated in subsection (a) . . . may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General . . . ."

Section 212 (d)(6) provides that the Attorney General "shall make a detailed report to the Congress in any

case in which he exercises his authority under paragraph (3) of this subsection on behalf of any alien excludable under paragraphs (9), (10), and (28) . . . ."

I

Ernest E. Mandel resides in Brussels, Belgium, and is a Belgian citizen. He is a professional journalist and is editor-in-chief of the Belgian Left Socialist weekly La Gauche. He is author of a two-volume work entitled Marxist Economic Theory published in 1969. He asserted in his visa applications that he is not a member of the Communist Party. He has described himself, however, as "a revolutionary Marxist." [2] He does not dispute, see 325 F. Supp. 620, 624, that he advocates the economic, governmental, and international doctrines of world communism.[3]

Mandel was admitted to the United States temporarily in 1962 and again in 1968. On the first visit he came as a working journalist. On the second he accepted invitations to speak at a number of universities and colleges. On each occasion, although apparently he was not then aware of it, his admission followed a finding of ineligibility under § 212 (a)(28), and the Attorney General's exercise of discretion to admit him temporarily, on recommendation of the Secretary of State, as § 212 (d)(3)(A) permits.

On September 8, 1969, Mandel applied to the American Consul in Brussels for a nonimmigrant visa to enter the United States in October for a six-day period, during which he would participate in a conference on

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[2] E. Mandel, Revolutionary Strategy in the Imperialist Countries (1969), reprinted in App. 54–66.

[3] Appellees, while suggesting that § 101 (a)(40), defining "world communism," and § 212 (a)(28)(D) are unacceptably vague, "do not contest the fact that appellants can and do conclude that Dr. Mandel's Marxist economic philosophy falls within the scope of these vague provisions." Brief for Appellees 10 n. 8.

Technology and the Third World at Stanford University.[4] He had been invited to Stanford by the Graduate Student Association there. The invitation stated that John Kenneth Galbraith would present the keynote address and that Mandel would be expected to participate in an ensuing panel discussion and to give a major address the following day. The University, through the office of its president, "heartily endorse[d]" the invitation. When Mandel's intended visit became known, additional invitations for lectures and conference participations came to him from members of the faculties at Princeton, Amherst, Columbia, and Vassar, from groups in Cambridge, Massachusetts, and New York City, and from others. One conference, to be in New York City, was sponsored jointly by the Bertrand Russell Peace Foundation and the Socialist Scholars Conference; Mandel's assigned subject there was "Revolutionary Strategy in Imperialist Countries." Mandel then filed a second visa application proposing a more extensive itinerary and a stay of greater duration.

On October 23 the Consul at Brussels informed Mandel orally that his application of September 8 had been refused. This was confirmed in writing on October 30. The Consul's letter advised him of the finding of inadmissibility under § 212 (a)(28) in 1962, the waivers in that year and in 1968, and the current denial of a waiver. It said, however, that another request for waiver was being forwarded to Washington in connection with Mandel's second application for a visa. The Department of State, by a letter dated November 6

[4] Entry presumably was claimed as a nonimmigrant alien under § 101 (a)(15)(H) of the Act, 8 U. S. C. § 1101 (a)(15)(H), namely, "an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability . . . ."

from its Bureau of Security and Consular Affairs to Mandel's New York attorney, asserted that the earlier waivers had been granted on condition that Mandel conform to his itinerary and limit his activities to the stated purposes of his trip, but that on his 1968 visit he had engaged in activities beyond the stated purposes.[5] For this reason, it was said, a waiver "was

[5] MR. JUSTICE DOUGLAS in his dissent, *post*, at 773 n. 4, states that Mandel's noncompliance with the conditions imposed for his 1968 visit "appear merely to have been his speaking at more universities than his visa application indicated." The letter dated November 6, 1969, from the Bureau of Security and Consular Affairs of the Department of State to Mandel's New York counsel observed: "On his 1968 visit, Mr. Mandel engaged in activities beyond the stated purposes of his trip. For this reason, a waiver of ineligibility was not sought in connection with his September visa application."

Counsel's affidavit in support of appellees' motion for the convening of a three-judge court and for the issuance of a preliminary injunction stated:

"Mr. Mandel further assured the Consul by letter on November 10, 1969 that he would not appear at any assembly in the United States at which money was solicited for any political cause. This was apparently in response to a charge that he had been present at such a solicitation during his 1968 tour. (See also Exhibit L.)

"Of course, just as Mr. Mandel had no prior notice that he was required to adhere to a stated itinerary in 1968, so Mr. Mandel was not aware that he was forbidden from appearing where contributions [were] solicited for political causes. I have been advised by Mr. George Novack, an American citizen, who coordinated Mr. Mandel's 1968 tour, that in fact the event in question was a cocktail reception held at the Gotham Art Theatre in New York City on October 19, 1968. Mr. Mandel addressed the gathering on the events in France during May and June. Later that evening posters by French students were auctioned. The money was sent to aid the legal defense of students who had taken part in the spring demonstrations. Mr. Mandel did not participate in the fund raising. (See Ex. L, Oct. 30, 1969 letter.)"

The asserted noncompliance by Mandel is therefore broader than mere acceptance of more speaking engagements than his visa application indicated.

not sought in connection with his September visa application." The Department went on to say, however, that it had now learned that Mandel might not have been aware in 1968 of the conditions and limitations attached to his visa issuance, and that, in view of this and upon his assurances that he would conform to his stated itinerary and purposes, the Department was reconsidering his case. On December 1 the Consul at Brussels informed Mandel that his visa had been refused.

The Department of State in fact had recommended to the Attorney General that Mandel's ineligibility be waived with respect to his October visa application. The Immigration and Naturalization Service, however, acting on behalf of the Attorney General, see 28 U. S. C. § 510, in a letter dated February 13, 1970, to New York counsel stated that it had determined that Mandel's 1968 activities while in the United States "went far beyond the stated purposes of his trip, on the basis of which his admission had been authorized and represented a flagrant abuse of the opportunities afforded him to express his views in this country." The letter concluded that favorable exercise of discretion, provided for under the Act, was not warranted and that Mandel's temporary admission was not authorized.

Mandel's address to the New York meeting was then delivered by transatlantic telephone.

In March Mandel and six of the other appellees instituted the present action against the Attorney General and the Secretary of State. The two remaining appellees soon came into the lawsuit by an amendment to the complaint. All the appellees who joined Mandel in this action are United States citizens and are university professors in various fields of the social sciences. They are persons who invited Mandel to speak at universities and other forums in the United States or who expected to participate in colloquia with him so that,

as the complaint alleged, "they may hear his views and engage him in a free and open academic exchange."

Plaintiff-appellees claim that the statutes are unconstitutional on their face and as applied in that they deprive the American plaintiffs of their First and Fifth Amendment rights. Specifically, these plaintiffs claim that the statutes prevent them from hearing and meeting with Mandel in person for discussions, in contravention of the First Amendment; that §212 (a)(28) denies them equal protection by permitting entry of "rightists" but not "leftists" and that the same section deprives them of procedural due process; that § 212 (d)(3)(A) is an unconstitutional delegation of congressional power to the Attorney General because of its broad terms, lack of standards, and lack of prescribed procedures; and that application of the statutes to Mandel was "arbitrary and capricious" because there was no basis in fact for concluding that he was ineligible, and no rational reason or basis in fact for denying him a waiver once he was determined ineligible. Declaratory and injunctive relief was sought.

A three-judge district court was duly convened. The case was tried on the pleadings and affidavits with exhibits. Two judges held that, although Mandel had no personal right to enter the United States, citizens of this country have a First Amendment right to have him enter and to hear him explain and seek to defend his views. The court then entered a declaratory judgment that § 212 (a)(28) and § 212 (d)(3)(A) were invalid and void insofar as they had been or might be invoked by the defendants to find Mandel ineligible for admission. The defendants were enjoined from implementing and enforcing those statutes so as to deny Mandel admission as a nonimmigrant visitor. 325 F. Supp. 620 (EDNY 1971). Judge Bartels dissented. *Id.*, at 637. Probable jurisdiction was noted. 404 U. S. 1013 (1972).

II

Until 1875 alien migration to the United States was unrestricted. The Act of March 3, 1875, 18 Stat. 477, barred convicts and prostitutes. Seven years later Congress passed the first general immigration statute. Act of Aug. 3, 1882, 22 Stat. 214. Other legislation followed. A general revision of the immigration laws was effected by the Act of Mar. 3, 1903, 32 Stat. 1213. Section 2 of that Act made ineligible for admission "anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government or of all forms of law." By the Act of Oct. 16, 1918, 40 Stat. 1012, Congress expanded the provisions for the exclusion of subversive aliens. Title II of the Alien Registration Act of 1940, 54 Stat. 671, amended the 1918 Act to bar aliens who, at any time, had advocated or were members of or affiliated with organizations that advocated violent overthrow of the United States Government.

In the years that followed, after extensive investigation and numerous reports by congressional committees, see *Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1, 94 n. 37 (1961), Congress passed the Internal Security Act of 1950, 64 Stat. 987. This Act dispensed with the requirement of the 1940 Act of a finding in each case, with respect to members of the Communist Party, that the party did in fact advocate violent overthrow of the Government. These provisions were carried forward into the Immigration and Nationality Act of 1952.

We thus have almost continuous attention on the part of Congress since 1875 to the problems of immigration and of excludability of certain defined classes of aliens. The pattern generally has been one of in-

creasing control with particular attention, for almost 70 years now, first to anarchists and then to those with communist affiliation or views.

III

It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise. *United States ex rel. Turner* v. *Williams*, 194 U. S. 279, 292 (1904); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 542 (1950); *Galvan* v. *Press*, 347 U. S. 522, 530–532 (1954); see *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 592 (1952).

The appellees concede this. Brief for Appellees 33; Tr. of Oral Arg. 28. Indeed, the American appellees assert that "they sue to enforce their rights, individually and as members of the American public, and assert none on the part of the invited alien." Brief for Appellees 14. "Dr. Mandel is in a sense made a plaintiff because he is symbolic of the problem." Tr. of Oral Arg. 22.

The case, therefore, comes down to the narrow issue whether the First Amendment confers upon the appellee professors, because they wish to hear, speak, and debate with Mandel in person, the ability to determine that Mandel should be permitted to enter the country or, in other words, to compel the Attorney General to allow Mandel's admission.

IV

In a variety of contexts this Court has referred to a First Amendment right to "receive information and ideas":

> "It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom [of speech and press] . . . necessarily

> protects the right to receive . . . .' *Martin* v. *City of Struthers,* 319 U. S. 141, 143 (1943) . . . ." *Stanley* v. *Georgia,* 394 U. S. 557, 564 (1969).

This was one basis for the decision in *Thomas* v. *Collins,* 323 U. S. 516 (1945). The Court there held that a labor organizer's right to speak and the rights of workers "to hear what he had to say," *id.,* at 534, were both abridged by a state law requiring organizers to register before soliciting union membership. In a very different situation, MR. JUSTICE WHITE, speaking for a unanimous Court upholding the FCC's "fairness doctrine" in *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 386–390 (1969), said:

> "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." *Id.,* at 390.

And in *Lamont* v. *Postmaster General,* 381 U. S. 301 (1965), the Court held that a statute permitting the Government to hold "communist political propaganda" arriving in the mails from abroad unless the addressee affirmatively requested in writing that it be delivered to him placed an unjustifiable burden on the addressee's First Amendment right. This Court has recognized that this right is "nowhere more vital" than in our schools and universities. *Shelton* v. *Tucker,* 364 U. S. 479, 487 (1960); *Sweezy* v. *New Hampshire,* 354 U. S. 234, 250 (1957) (plurality opinion); *Keyishian* v. *Board of Regents,* 385 U. S. 589, 603 (1967). See *Epperson* v. *Arkansas,* 393 U. S. 97 (1968).

In the present case, the District Court majority held:

> "The concern of the First Amendment is not with a non-resident alien's individual and personal interest in entering and being heard, but with the rights of the citizens of the country to have the alien enter and to hear him explain and seek to defend his views; that, as *Garrison* [v. *Louisiana*, 379 U. S. 64 (1964)] and *Red Lion* observe, is of the essence of self-government." 325 F. Supp., at 631.

The Government disputes this conclusion on two grounds. First, it argues that exclusion of Mandel involves no restriction on First Amendment rights at all since what is restricted is "only action—the action of the alien in coming into this country." Brief for Appellants 29. Principal reliance is placed on *Zemel* v. *Rusk*, 381 U. S. 1 (1965), where the Government's refusal to validate an American passport for travel to Cuba was upheld. The rights asserted there were those of the passport applicant himself. The Court held that his right to travel and his asserted ancillary right to inform himself about Cuba did not outweigh substantial "foreign policy considerations affecting all citizens" that, with the backdrop of the Cuban missile crisis, were characterized as the "weightiest considerations of national security." *Id.*, at 13, 16. The rights asserted here, in some contrast, are those of American academics who have invited Mandel to participate with them in colloquia, debates, and discussion in the United States. In light of the Court's previous decisions concerning the "right to receive information," we cannot realistically say that the problem facing us disappears entirely or is nonexistent because the mode of regulation bears directly on physical movement. In *Thomas* the registration requirement on its

face concerned only action. In *Lamont,* too, the face of the regulation dealt only with the Government's undisputed power to control physical entry of mail into the country. See *United States* v. *Robel,* 389 U. S. 258, 263 (1967).

The Government also suggests that the First Amendment is inapplicable because appellees have free access to Mandel's ideas through his books and speeches, and because "technological developments," such as tapes or telephone hook-ups, readily supplant his physical presence. This argument overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning. While alternative means of access to Mandel's ideas might be a relevant factor were we called upon to balance First Amendment rights against governmental regulatory interests—a balance we find unnecessary here in light of the discussion that follows in Part V—we are loath to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access.

V

Recognition that First Amendment rights are implicated, however, is not dispositive of our inquiry here. In accord with ancient principles of the international law of nation-states, the Court in *The Chinese Exclusion Case,* 130 U. S. 581, 609 (1889), and in *Fong Yue Ting* v. *United States,* 149 U. S. 698 (1893), held broadly, as the Government describes it, Brief for Appellants 20, that the power to exclude aliens is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government . . . ." Since that time, the Court's general reaffirmations of this principle have

been legion.[6] The Court without exception has sustained Congress' "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Boutilier* v. *Immigration and Naturalization Service,* 387 U. S. 118, 123 (1967). "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320, 339 (1909). In *Lem Moon Sing* v. *United States,* 158 U. S. 538, 547 (1895), the first Mr. Justice Harlan said:

> "The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications."

Mr. Justice Frankfurter ably articulated this history in *Galvan* v. *Press,* 347 U. S. 522 (1954), a deportation case, and we can do no better. After suggesting, at 530, that "much could be said for the view" that due process places some limitations on congresssional power in this area "were we writing on a clean slate," he continued:

> "But the slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history' . . . but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with

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[6] See, for example, *Ekiu* v. *United States,* 142 U. S. 651, 659 (1892); *Fok Yung Yo* v. *United States,* 185 U. S. 296, 302 (1902); *United States ex rel. Turner* v. *Williams,* 194 U. S. 279, 294 (1904); *Keller* v. *United States,* 213 U. S. 138, 143–144 (1909); *Mahler* v. *Eby,* 264 U. S. 32, 40 (1924); *Shaughnessy* v. *Mezei,* 345 U. S. 206, 210 (1953); cf. *Graham* v. *Richardson,* 403 U. S. 365, 377 (1971).

> the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. . . . But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government. . . .
>
> "We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution, and must therefore under our constitutional system recognize congressional power in dealing with aliens . . . ." *Id.*, at 531–532.

We are not inclined in the present context to reconsider this line of cases. Indeed, the appellees, in contrast to the *amicus*, do not ask that we do so. The appellees recognize the force of these many precedents. In seeking to sustain the decision below, they concede that Congress could enact a blanket prohibition against entry of all aliens falling into the class defined by §§ 212 (a)(28)(D) and (G)(v), and that First Amendment rights could not override that decision. Brief for Appellees 16. But they contend that by providing a waiver procedure, Congress clearly intended that persons ineligible under the broad provision of the section would be temporarily admitted when appropriate "for humane reasons and for reasons of public interest." S. Rep. No. 1137, 82d Cong., 2d Sess., 12 (1952). They argue that the Executive's implementation of this congressional mandate through decision whether to grant a waiver in each individual case must be limited by the First Amendment rights of persons like appellees. Specifically, their position is that the First Amendment rights must prevail, at least where the Gov-

ernment advances no justification for failing to grant a waiver. They point to the fact that waivers have been granted in the vast majority of cases.[7]

Appellees' First Amendment argument would prove too much. In almost every instance of an alien excludable under § 212 (a)(28), there are probably those who would wish to meet and speak with him. The ideas of most such aliens might not be so influential as those of Mandel, nor his American audience so numerous, nor the planned discussion forums so impressive. But the First Amendment does not protect only the articulate, the well known, and the popular. Were we to endorse the proposition that governmental power to withhold a waiver must yield whenever a bona fide claim is made that American citizens wish to meet and talk with an alien excludable under § 212 (a)(28), one of two unsatisfactory results would necessarily ensue. Either every claim would prevail, in which case the plenary discretionary authority Congress granted the Executive becomes a nullity, or

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[7] The Government's brief states:

"The Immigration and Naturalization Service reports the following with respect to applications to the Attorney General for waiver of an alien's ineligibility for admission under Section 212 (a)(28):

"Year	Total Number of Applications for Waiver of Section 212 (a)(28)	Number of Waivers Granted	Number of Waivers Denied
1971	6210	6196	14
1970	6193	6189	4
1969	4993	4984	9
1968	4184	4176	8
1967	3860	3852	8"

Brief for Appellants 18 n. 24. These cases, however, are only those that, as § 212 (d)(3)(A) provides, come to the Attorney General with a positive recommendation from the Secretary of State or the consular officer. The figures do not include those cases where these officials had refrained from making a positive recommendation.

courts in each case would be required to weigh the strength of the audience's interest against that of the Government in refusing a waiver to the particular alien applicant, according to some as yet undetermined standard. The dangers and the undesirability of making that determination on the basis of factors such as the size of the audience or the probity of the speaker's ideas are obvious. Indeed, it is for precisely this reason that the waiver decision has, properly, been placed in the hands of the Executive.

Appellees seek to soften the impact of this analysis by arguing, as has been noted, that the First Amendment claim should prevail, at least where no justification is advanced for denial of a waiver. Brief for Appellees 26. The Government would have us reach this question, urging a broad decision that Congress has delegated the waiver decision to the Executive in its sole and unfettered discretion, and any reason or no reason may be given. See *Jay* v. *Boyd*, 351 U. S. 345, 357–358 (1956); *Hintopoulos* v. *Shaughnessy*, 353 U. S. 72, 77 (1957); *Kimm* v. *Rosenberg*, 363 U. S. 405, 408 (1960). This record, however, does not require that we do so, for the Attorney General did inform Mandel's counsel of the reason for refusing him a waiver. And that reason was facially legitimate and bona fide.

The Government has chosen not to rely on the letter to counsel either in the District Court or here. The fact remains, however, that the official empowered to make the decision stated that he denied a waiver because he concluded that previous abuses by Mandel made it inappropriate to grant a waiver again. With this, we think the Attorney General validly exercised the plenary power that Congress delegated to the Executive by §§ 212 (a) (28) and (d)(3).

In summary, plenary congressional power to make policies and rules for exclusion of aliens has long been

firmly established. In the case of an alien excludable under § 212 (a)(28), Congress has delegated conditional exercise of this power to the Executive. We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant. What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address nor decide in this case.

Reversed.

MR. JUSTICE DOUGLAS, dissenting.

Under *The Chinese Exclusion Case,* 130 U. S. 581, rendered in 1889, there could be no doubt but that Congress would have the power to exclude any class of aliens from these shores. The accent at the time was on race. Mr. Justice Field, writing for the Court, said: "If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects." *Id.,* at 606.

An ideological test, not a racial one, is used here. But neither, in my view, is permissible, as I have indicated on other occasions.[1] Yet a narrower question is raised here. Under the present Act aliens who advocate or teach "the economic, international, and governmental doctrines of world communism" are ineligible to receive

[1] See *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 598 (dissenting opinion); *Galvan* v. *Press,* 347 U. S. 522, 533 (dissenting opinion).

visas "[e]xcept as otherwise provided in this Act." [2] The "except" provision is contained in another part of the same section [3] and states that an inadmissible alien "may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer" be admitted "temporarily despite his inadmissibility."

Dr. Ernest Mandel, who is described as "an orthodox Marxist of the Trotskyist school," has been admitted to this country twice before—once as a working journalist in 1962 and once as a lecturer in 1968. The present case involves his third application, made in 1969, to attend a conference at Stanford University on Technology and the Third World. He was also invited to attend other conferences, one at MIT, and to address several universities, Princeton, Amherst, the New School, Columbia, and Vassar. This time the Department of Justice refused to grant a waiver recommended by the State Department; and it claims that it need not state its reasons, that the power of the Attorney General is unfettered.

Dr. Mandel is not the sole complainant. Joining him are the other appellees who represent the various audiences which Dr. Mandel would be meeting were a visa to issue. While Dr. Mandel, an alien who seeks admission, has no First Amendment rights while outside the Nation, the other appellees are on a different footing. The First Amendment involves not only the right to speak and publish but also the right to hear, to learn, to know. *Martin* v. *City of Struthers,* 319 U. S. 141, 143; *Stanley* v. *Georgia,* 394 U. S. 557, 564.

Can the Attorney General under the broad discretion entrusted in him decide

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[2] § 212 (a)(28)(G)(v) of the Immigration and Nationality Act of 1952, 66 Stat. 185, 8 U. S. C. § 1182 (a)(28)(G)(v).

[3] § 212 (d)(3)(A), 8 U. S. C. § 1182 (d)(3)(A).

that one who maintains that the earth is round can be excluded?

that no one who believes in the Darwinian theory shall be admitted?

that those who promote a Rule of Law to settle international differences rather than a Rule of Force may be barred?

that a genetic biologist who lectures on the way to create life by one sex alone is beyond the pale?

that an exponent of plate tectonics can be barred?

that one should be excluded who taught that Jesus when he arose from the Sepulcher, went east (not up) and became a teacher at Hemis Monastery in the Himalayas?

I put the issue that bluntly because national security is not involved. Nor is the infiltration of saboteurs. The Attorney General stands astride our international terminals that bring people here to bar those whose ideas are not acceptable to him. Even assuming, *arguendo,* that those on the outside seeking admission have no standing to complain, those who hope to benefit from the traveler's lectures do.

Thought control is not within the competence of any branch of government. Those who live here may need exposure to the ideas of people of many faiths and many creeds to further their education. We should construe the Act generously by that First Amendment standard, saying that once the State Department has concluded that our foreign relations permit or require the admission of a foreign traveler, the Attorney General is left only problems of national security, importation of heroin, or other like matters within his competence.

We should assume that where propagation of ideas is permissible as being within our constitutional framework, the Congress did not undertake to make the Attorney General a censor. For as stated by Justice

Jackson in *Thomas* v. *Collins,* 323 U. S. 516, 545 (concurring), "[t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us."

In *Brandenburg* v. *Ohio,* 395 U. S. 444 (which overruled *Whitney* v. *California,* 274 U. S. 357), we held that the First Amendment does not permit a State "to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.,* at 447. That case involved propagation of the views of the Ku Klux Klan. The present case involves teaching the communist creed.[4] But, as we held in *Noto* v. *United States,* 367 U. S. 290, 297–298:

> "[T]he mere abstract teaching of Communist theory, including the teaching of the moral pro-

[4] The Court recognizes the legitimacy of appellees' First Amendment claim, *ante,* at 762–765. It argues, however, that inasmuch as the Attorney General gave a "facially legitimate and bona fide" reason to refuse Dr. Mandel a waiver of ineligibility, the Court should not "look behind the exercise of that discretion, nor test it by balancing its justification against [appellees'] First Amendment interests . . . ." First, so far as the record reveals, there is absolutely no support for the Attorney General's claim that Dr. Mandel consciously abused his visa privileges in 1968. Indeed, the State Department itself concedes that he *"was apparently not informed [in 1962 and 1968] that a visa was issued only after obtaining a waiver of ineligibility and therefore may not have been aware of the conditions and limitations attached to the visa issuance."* (Emphasis supplied.) App. 22. Second, the activities which the Attorney General labeled "flagrant abuses" of Dr. Mandel's opportunity to speak in the United States appear merely to have been his speaking at more universities than his visa application indicated. Indeed, he spoke at more than

> priety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."

As a matter of statutory construction, I conclude that Congress never undertook to entrust the Attorney General with the discretion to pick and choose among the ideological offerings which alien lecturers tender from our platforms, allowing those palatable to him and disallowing others.[5] The discretion entrusted to him concerns matters commonly within the competence of the Department of Justice—national security, importation of drugs, and the like.

I would affirm the judgment of the three-judge District Court.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Dr. Ernest Mandel, a citizen of Belgium, is an internationally famous Marxist scholar and journalist. He was invited to our country by a group of American scholars who wished to meet him for discussion and debate. With firm plans for conferences, colloquia and lectures, the American hosts were stunned to learn that Mandel had been refused permission to enter our country. American consular officials had found Mandel "in-

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30 universities in the United States and Canada, including Harvard, the University of California at Berkeley, Swarthmore, Notre Dame, Antioch, Michigan, three appearances at Columbia, two at the University of Pennsylvania, and the keynote address at the 1968 Socialist Scholars Conference held at Rutgers. App. 25. It would be difficult to invent a more trivial reason for denying the academic community the chance to exchange views with an internationally respected scholar.

[5] As indicated in S. Rep. No. 1137, 82d Cong., 2d Sess., 12, the discretion vested in the Attorney General was to be exercised "for emergent reasons or for reasons deemed strictly in the public interest." Ideological controls are not congenial to our First Amendent traditions and therefore should not be inferred.

eligible" to receive a visa under §§ 212 (a)(28)(D) and (G)(v) of the Immigration and Nationality Act of 1952, 66 Stat. 185, which bars even temporary visits to the United States by aliens who "advocate the economic, international, and governmental doctrines of world communism" or "who write or publish . . . any written or printed matter . . . advocating or teaching" such doctrines. Under § 212 (d)(3), the Attorney General refused to waive inadmissibility.

I, too, am stunned to learn that a country with our proud heritage has refused Dr. Mandel temporary admission. I am convinced that Americans cannot be denied the opportunity to hear Dr. Mandel's views in person because their Government disapproves of his ideas. Therefore, I dissent from today's decision and would affirm the judgment of the court below.

I

As the majority correctly demonstrates, in a variety of contexts this Court has held that the First Amendment protects the right to receive information and ideas, the freedom to hear as well as the freedom to speak. The reason for this is that the First Amendment protects a process, in Justice Brandeis' words, "reason as applied through public discussion," *Whitney* v. *California,* 274 U. S. 357, 375 (1927) (concurring opinion); and the right to speak and hear—including the right to inform others and to be informed about public issues—are inextricably part of that process. The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion. The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the "means indispensable to the discovery and spread of political truth." *Ibid.;* see *Terminiello* v. *Chicago,* 337 U. S. 1, 4 (1949). Its

protection is "a fundamental principle of the American government." *Whitney* v. *California, supra,* at 375. The First Amendment means that Government has no power to thwart the process of free discussion, to "abridge" the freedoms necessary to make that process work. See *Lamont* v. *Postmaster General,* 381 U. S. 301, 308 (1965) (BRENNAN, J., concurring, with whom Goldberg and Harlan, JJ., joined).

There can be no doubt that by denying the American appellees access to Dr. Mandel, the Government has directly prevented the free interchange of ideas guaranteed by the First Amendment.[1] It has, of course, interfered with appellees' personal rights both to hear Mandel's views and to develop and articulate their own views through interaction with Mandel. But as the court below recognized, apart from appellees' interests, there is also a "general public interest in the prevention of any stifling of political utterance." 325 F. Supp. 620, 632 (1971). And the Government has interfered with this as well.[2]

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[1] Twenty years ago, the Bulletin of the Atomic Scientists devoted an entire issue to the problem of American visa policy and its effect on the interchange of ideas between American scholars and scientists and their foreign counterparts. The general conclusion of the editors—supported by printed statements of such men as Albert Einstein, Hans Bethe, Harold Urey, Arthur Compton, Michael Polanyi, and Raymond Aron—was that American visa policy was hurting the continuing advance of American science and learning, and harmful to our prestige abroad. Vol. 8, No. 7, Oct. 1952, pp. 210–217 (statement of Special Editor Edward Shils). The detrimental effect of American visa policy on the free exchange of ideas continues to be reported. See Comment, Opening the Floodgates to Dissident Aliens, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 141, 143–149 (1970); 11 Bulletin of the Atomic Scientists, Dec. 1955, pp. 367–373.

[2] The availability to appellees of Mandel's books and taped lectures is no substitute for live, face-to-face discussion and debate, just

II

What is the justification for this extraordinary governmental interference with the liberty of American citizens? And by what reasoning does the Court uphold Mandel's exclusion? It is established constitutional doctrine, after all, that government may restrict First Amendment rights only if the restriction is necessary to further a compelling governmental interest. *E. g.*, *Lamont* v. *Postmaster General, supra,* at 308; *NAACP* v. *Button,* 371 U. S. 415, 438 (1963); *Gibson* v. *Florida Legislative Investigation Committee,* 372 U. S. 539, 546 (1963); *Shelton* v. *Tucker,* 364 U. S. 479 (1960).

A. Today's majority apparently holds that Mandel may be excluded and Americans' First Amendment rights restricted because the Attorney General has given a "facially legitimate and bona fide reason" for refusing to waive Mandel's visa ineligibility. I do not understand the source of this unusual standard. Merely "legitimate" governmental interests cannot override constitutional rights. Moreover, the majority demands only "facial" legitimacy and good faith, by which it means that this Court will never "look behind" any reason the Attorney General gives. No citation is given for this kind of unprecedented deference to the Executive,

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as the availability to us of briefs and exhibits does not supplant the essential place of oral argument in this Court's work. Lengthy citations for this proposition, which the majority apparently concedes, are unnecessary. I simply note that in a letter to Henrik Lorenz, accepting an invitation to lecture at the University of Leiden and to discuss "the radiation problem," Albert Einstein observed that "[i]n these unfinished things, people understand one another with difficulty unless talking face to face." Quoted in Developments in the Law—The National Security Interest and Civil Liberties, 85 Harv. L. Rev. 1130, 1154 (1972).

nor can I imagine (nor am I told) the slightest justification for such a rule.[3]

Even the briefest peek behind the Attorney General's reason for refusing a waiver in this case would reveal that it is a sham. The Attorney General informed appellees' counsel that the waiver was refused because Mandel's activities on a previous American visit "went far beyond the stated purposes of his trip . . . and represented a flagrant abuse of the opportunities afforded him to express his views in this country." App. 68. But, as the Department of State had already conceded to appellees' counsel, Dr. Mandel "was apparently not informed that [his previous] visa was issued only after obtaining a waiver of ineligibility and therefore [Mandel] may not have been aware of the conditions and limitations attached to the [previous] visa issuance." App. 22. There is *no* basis in the present record for concluding that Mandel's behavior on his previous visit was a "flagrant abuse"—or even willful or knowing departure—from visa restrictions. For good reason, the Government in this litigation has *never* relied on the Attorney General's reason to justify Mandel's exclusion. In these circumstances, the Attorney General's reason cannot possibly support a decision for the Government in this case. But without even remanding for a factual hearing to see if there is *any* support for the Attorney General's determination, the majority declares that his reason is sufficient to override appellees' First Amendment interests.

B. Even if the Attorney General had given a com-

[3] As Judge Frankel has taught us, even the limited requirement of facially sufficient reasons for governmental action may be significant in some contexts; but it can hardly insulate the government from subsequent challenges to the actual good faith and sufficiency of the reasons. Frankel, Bench Warrants Upon the Prosecutor's Demand: A View From the Bench, 71 Col. L. Rev. 403, 414 (1971).

pelling reason for declining to grant a waiver under § 212 (d)(3)(A), this would not, for me, end the case. As I understand the statutory scheme, Mandel is "ineligible" for a visa, and therefore inadmissible, solely because, within the terms of § 212 (a)(28), he has advocated communist doctrine and has published writings advocating that doctrine. The waiver question under § 212 (d)(3)(A) is totally secondary and dependent, since it is triggered here only by a determination of (a)(28) ineligibility. The Attorney General's refusal to grant a waiver does not itself generate a new statutory basis for exclusion; he has no roving power to set new *ad hoc* standards for visa ineligibility. Rather, the Attorney General's refusal to waive ineligibility simply has the same effect as if no waiver provision existed; inadmissibility still rests on the (a)(28) determination. Thus, whether or not the Attorney General had a good reason for refusing a waiver, this Court, I think, must still face the question it tries to avoid: under our Constitution, may Mandel be declared ineligible under (a)(28)?

C. Accordingly, I turn to consider the constitutionality of the sole justification given by the Government here and below for excluding Mandel—that he "advocates and "publish[es] . . . printed matter . . . advocating . . . doctrines of world communism" within the terms of § 212 (a)(28).

Still adhering to standard First Amendment doctrine, I do not see how (a)(28) can possibly represent a compelling governmental interest that overrides appellees' interests in hearing Mandel.[4] Unlike (a)(27) or (a)(29),

[4] The majority suggests that appellees "concede that Congress could enact a blanket prohibition against entry of all aliens falling into the class defined by §§ 212 (a)(28)(D) and (G)(v) and that First Amendment rights could not override that decision." This was certainly not the view of the court below, whose judgment the *appellants* alone have challenged here and appellees have moved to

(a)(28) does not claim to exclude aliens who are likely to engage in subversive activity or who represent an active and present threat to the "welfare, safety, or security of the United States." Rather, (a)(28) excludes aliens solely because they have advocated communist doctrine. Our cases make clear, however, that government has no legitimate interest in stopping the flow of ideas. It has no power to restrict the mere advocacy of communist doctrine, divorced from incitement to imminent lawless action. *Noto* v. *United States*, 367 U. S. 290, 297–298 (1961); *Brandenburg* v. *Ohio*, 395 U. S. 444, 447–449 (1969). For those who are not sure that they have attained the final and absolute truth, all ideas, even those forcefully urged, are a contribution to the ongoing political dialogue. The First Amendment represents the view of the Framers that "the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones"—"more speech." *Whitney* v. *California*, 274 U. S., at 375, 377 (Brandeis, J., concurring). If Americans want to hear about Marxist doctrine, even from advocates, government cannot intervene simply because it does not approve of the ideas. It certainly may not selectively pick and choose which ideas it will let into the country. But, as the court below put it, § 212 (a)(28) is nothing more than "a means of restraining the entry of disfavored political doctrine," 325 F. Supp., at 626, and such an enactment cannot justify the abridgment of appellees' First Amendment rights.

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affirm. It is true that appellees have argued to this Court a ground of decision alternative to that argued and adopted below; but they have hardly *conceded* the incorrectness of what they successfully argued below. They have simply noted, at 16–17 of their brief, that even if this Court rejects the broad decision below, there would nevertheless be a separate and narrower basis for affirmance. See Tr. of Oral Arg. 24, 25–26, 41–42.

In saying these things, I am merely repeating established First Amendment law. Indeed, this Court has already applied that law in a case concerning the entry of communist doctrine from foreign lands. In *Lamont* v. *Postmaster General*, 381 U. S. 301 (1965), this Court held that the right of an American addressee to receive communist political propaganda from abroad could not be fettered by requiring the addressee to request in writing its delivery from the Post Office. See *id.*, at 308 (BRENNAN, J., concurring). The burden imposed on the right to receive information in our case is far greater than in *Lamont*, with far less justification. In *Lamont*, the challenged law merely regulated the flow of mail, and required the Postmaster General to forward detained mail immediately upon request by the addressee. By contrast, through § 212 (a)(28), the Government claims absolute power to bar Mandel permanently from academic meetings in this country. Moreover, in *Lamont*, the Government argued that its interest was not to censor content but rather to protect Americans from receiving unwanted mail. Here, Mandel's exclusion is not incident to a legitimate regulatory objective, but is based directly on the subject matter of his beliefs.

D. The heart of appellants' position in this case, and the basis for their distinguishing *Lamont*, is that the Government's power is distinctively broad and unreviewable because "[t]he regulation in question is directed at the admission of aliens." Brief for Appellants 33. Thus, in the appellants' view, this case is no different from a long line of cases holding that the power to exclude aliens is left exclusively to the "political" branches of Government, Congress, and the Executive.

These cases are not the strongest precedents in the United States Reports, and the majority's baroque approach reveals its reluctance to rely on them completely.

They include such milestones as *The Chinese Exclusion Case,* 130 U. S. 581 (1889), and *Fong Yue Ting* v. *United States,* 149 U. S. 698 (1893), in which this Court upheld the Government's power to exclude and expel Chinese aliens from our midst.

But none of these old cases must be "reconsidered" or overruled to strike down Dr. Mandel's exclusion, for none of them was concerned with the rights of American citizens. All of them involved only rights of the excluded aliens themselves. At least when the rights of Americans are involved, there is no basis for concluding that the power to exclude aliens is absolute. "When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated." *United States* v. *Robel,* 389 U. S. 258, 264 (1967). As *Robel* and many other cases[5] show, all governmental

[5] In *United States* v. *Robel,* 389 U. S. 258 (1967), this Court struck down a statute making it a criminal offense for any employee of a "defense facility" to remain a member of the Communist Party, in spite of Government claims that the enactment came within the "war power." In *Aptheker* v. *Secretary of State,* 378 U. S. 500 (1964), the Government unsuccessfully sought to defend the denial of passports to American members of the Communist Party, in spite of claimed threats to the national security. In *Zemel* v. *Rusk,* 381 U. S. 1 (1965), the passport restriction on travel to Cuba was upheld because individual constitutional rights were overridden by the "weightiest considerations of national security"; but the Court rejected any assumption "that simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice." *Id.,* at 16, 17. In *Schneider* v. *Rusk,* 377 U. S. 163 (1964), the Government unsuccessfully attempted to justify a statutory inequality between naturalized and native-born citizens under the foreign relations power. And in *Lamont* v. *Postmaster General,* 381 U. S. 301 (1965), itself, as MR. JUSTICE BRENNAN noted, the Government urged that the statute was "justified by the object of avoiding

power—even the war power, the power to maintain national security, or the power to conduct foreign affairs—is limited by the Bill of Rights. When individual freedoms of Americans are at stake, we do not blindly defer to broad claims of the Legislative Branch or Executive Branch, but rather we consider those claims in light of the individual freedoms. This should be our approach in the present case, even though the Government urges that the question of admitting aliens may involve foreign relations and national defense policies.

The majority recognizes that the right of American citizens to hear Mandel is "implicated" in our case. There were no rights of Americans involved in any of the old alien exclusion cases, and therefore their broad counsel about deference to the political branches is inapplicable. Surely a Court that can distinguish between pre-indictment and post-indictment lineups, *Kirby* v. *Illinois*, 406 U. S. 682 (1972), can distinguish between our case and cases which involve only the rights of aliens.

I do not mean to suggest that simply because some Americans wish to hear an alien speak, they can automatically compel even his temporary admission to our country. Government may prohibit aliens from even temporary admission if exclusion is necessary to protect a compelling governmental interest.[6] Actual threats to the national security, public health needs, and genuine requirements of law enforcement are the most apparent

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the subsidization of propaganda of foreign governments which bar American propaganda"; MR. JUSTICE BRENNAN answered that the Government must act "by means and on terms which do not endanger First Amendment rights." *Id.*, at 310.

[6] I agree with the majority that courts should not inquire into such things as the "probity of the speaker's ideas." Neither should the Executive, however. Where Americans wish to hear an alien, and their claim is not a demonstrated sham, the crucial question is whether the *Government's* interest in excluding the alien is compelling.

interests that would surely be compelling.[7] But in Dr. Mandel's case, the Government has, and claims, no such compelling interest. Mandel's visit was to be temporary.[8] His "ineligibility" for a visa was based solely on § 212 (a)(28). The only governmental interest embodied in that section is the Government's desire to keep certain ideas out of circulation in this country. This is hardly a compelling governmental interest. Section (a)(28) may not be the basis for excluding an alien when Americans wish to hear him. Without any claim that Mandel "live" is an actual threat to this country, there is no difference between excluding Mandel because of his ideas and keeping his books out because of their ideas. Neither is permitted. *Lamont* v. *Postmaster General, supra.*

III

Dr. Mandel has written about his exclusion, concluding that "[i]t demonstrates a lack of confidence" on the part of our Government "in the capacity of its supporters to combat Marxism on the battleground of ideas." He observes that he "would not be carrying any high explosives, if I had come, but only, as I did before, my revolutionary views which are well known to the public." And he wryly notes that "[i]n the nineteenth century the British ruling class, which was sure of itself, permitted Karl Marx to live as an exile in England for almost forty years." App. 54.

It is undisputed that Dr. Mandel's brief trip would involve nothing but a series of scholarly conferences and lectures. The progress of knowledge is an inter-

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[7] It goes without saying, of course, that, once he has been admitted, any alien (like any citizen) can be punished if he incites lawless acts or commits other crimes.

[8] Such "nonimmigrants" are not covered by quotas. C. Gordon & H. Rosenfield, Immigration Law and Procedure § 2.6 (1971).

national venture. As Mandel's invitation demonstrates, individuals of differing world views have learned the ways of cooperation where governments have thus far failed. Nothing is served—least of all our standing in the international community—by Mandel's exclusion. In blocking his admission, the Government has departed from the basic traditions of our country, its fearless acceptance of free discussion. By now deferring to the Executive, this Court departs from its own best role as the guardian of individual liberty in the face of governmental overreaching. Principles of judicial restraint designed to allow the political branches to protect national security have no place in this case. Dr. Mandel should be permitted to make his brief visit.

I dissent.

MOORE *v.* ILLINOIS

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 69–5001. Argued January 18, 1972—Decided June 29, 1972

Moore, who was convicted of murder and sentenced to death for the shotgun slaying of a bartender at a Lansing, Illinois, tavern, claimed that he was denied a fair trial and due process because the State failed to make pretrial disclosure of several items of evidence helpful to the defense, failed to correct false testimony of one Powell, and succeeded in introducing into evidence a shotgun that was not the murder weapon. The evidence not disclosed consisted of a pretrial statement by one Sanders that Moore was known to him as "Slick" and that he had first met "Slick" some six months before the killing, and documents and testimony that established that Moore was not the man known to others in the area as "Slick." Powell testified that he observed the killing, and the State did not introduce into evidence a diagram that, Moore claims, illustrates that Powell could not see the shooting. The State Supreme Court rejected the claim that evidence had been suppressed and false evidence had been left uncorrected, and held that the shotgun was properly admitted into evidence as a weapon in Moore's possession when he was arrested and suitable for commission of the crime charged. Moore also attacked the imposition of the death penalty for noncompliance with the standards of *Witherspoon* v. *Illinois,* 391 U. S. 510. *Held:*

1. The evidentiary items (other than the diagram) on which Moore bases his suppression claim relate to Sanders' misidentification of Moore as "Slick" and not to the identification, by Sanders and others, of Moore as the person who made incriminating statements in the Ponderosa Tap. These evidentiary items are not material under the standard of *Brady* v. *Maryland,* 373 U. S. 83. The diagram does not support Moore's contention that the State knowingly permitted false testimony to remain uncorrected, in violation of *Napue* v. *Illinois,* 360 U. S. 264, since the diagram does not show that it was impossible for Powell to see the shooting. Pp. 794–798.

2. Moore's due process claim as to the shotgun was not previously raised and therefore is not properly before this Court, and in any event the introduction of the shotgun does not constitute federally reversible error. Pp. 798–800.

3. The sentence of death may not be imposed on Moore. *Furman* v. *Georgia, ante,* p. 238. P. 800.

42 Ill. 2d 73, 246 N. E. 2d 299, reversed in part and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, and REHNQUIST, JJ., joined. MARSHALL, J., filed an opinion concurring in part and dissenting in part, in which DOUGLAS, STEWART, and POWELL, JJ., joined, *post,* p. 800.

James J. Doherty argued the cause for petitioner. With him on the briefs was *Gerald W. Getty.*

Thomas J. Immel, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *William J. Scott,* Attorney General, *Joel M. Flaum,* First Assistant Attorney General, and *James B. Zagel* and *Jayne A. Carr,* Assistant Attorneys General.

Briefs of *amici curiae* urging reversal were filed by *Elmer Gertz* and *Willard J. Lassers* for the American Civil Liberties Union, Illinois Division, et al., and by *Jack Greenberg, James M. Nabrit III, Jack Himmelstein,* and *Anthony G. Amsterdam* for the NAACP Legal Defense and Educational Fund, Inc., et al.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This state murder case, with the death penalty imposed by a jury, comes here from the Supreme Court of Illinois. The grant of certiorari, 403 U. S. 953 (1971), was limited to three of four questions presented by the petition. These concern the nondisclosure to the defense of allegedly exculpatory evidence possessed by the prosecution or the police; the admission into evidence of a shotgun that was not the murder weapon; and the rejection of eight veniremen who had voiced general objections to capital punishment. The first and third issues respectively focus on the application of *Brady* v.

Maryland, 373 U. S. 83 (1963), and *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968).

I

Petitioner Lyman A. Moore was convicted in 1964 of the first-degree murder of Bernard Zitek. Moore's appeal to the Supreme Court of Illinois was held in abeyance while he petitioned the trial court for post-conviction relief. After a hearing in January 1967, that petition was denied. Moore's appeal from the denial was consolidated with his appeal from the conviction and sentence. With one justice dissenting and another not participating, the Illinois court affirmed the judgments. 42 Ill. 2d 73, 246 N. E. 2d 299 (1969).

II

The homicide was committed on April 25, 1962. The facts are important:

A. The victim, Zitek, operated a bar-restaurant in the village of Lansing, southeast of Chicago. Patricia Hill was a waitress there. Donald O'Brien, Charles A. Mayer, and Henley Powell were customers.

Another bar called the Ponderosa Tap was located in Dolton, also southeast of Chicago. It was owned by Robert Fair. William Joyce was the bartender. One of Fair's customers was Virgle Sanders.

A third bar known as Wanda and Del's was in Chicago. Delbert Jones was the operator. William Leon Thompson was a patron.

The Westmoreland Country Club was in Wilmette, about 50 miles north of Lansing. The manager there was Herbert Anderson.

B. On the evening of April 25 Zitek was tending bar at his place in Lansing. Shortly before 10 p. m. two men, one with a moustache, entered and ordered beer. Zitek admonished the pair several times for using pro-

fane language. They continued in their profanity and, shortly, Zitek ejected them. About an hour later a man carrying a shotgun entered. He laid the weapon on the bar and shot and killed Zitek. The gunman ran out, pursued by patrons, and escaped in an automobile.

C. At the trial waitress Hill positively identified Moore as one of the two men ejected from the bar and as the one who returned and killed Zitek. She testified that she had a clear and close view from her working area at the bar and that she observed Zitek's ejection of the two men and the shotgun killing an hour later.

D. A second in-court identification of Moore as the man who killed Zitek was made by the customer Powell. Powell, who at the time was playing pinochle with others, testified that he observed Moore enter the bar with a shotgun and shoot Zitek; that after the shooting he pursued Moore; and that outside the bar Moore stopped momentarily, turned, and shouted, "Don't come any further or I'll shoot you, too."

E. Sanders testified that on April 27, two days after the murder, he was in the Ponderosa Tap and that a customer there, whom Sanders identified as "Slick," remarked to Sanders that it was "open season on bartenders" and that he had shot one in Lansing. At the trial Sanders identified Moore as the man who was in the Ponderosa Tap on April 27. Moore was with another man who had a moustache. The two asked for a ride to Harvey, Illinois. The owner, Fair, agreed to give them the ride.

F. Fair testified that Moore was one of the two men who requested and were given the ride; that during the journey one of them was referred to as "Barbee"; and that one said "something like, 'Well, if we hadn't had that trouble with the bartender in Lansing, we'd have been all right.' "

G. The Ponderosa bartender, Joyce, testified that San-

ders and Fair were in that tavern on April 27; that Moore was there at the same time; and that he arranged with Fair for Fair to give Moore and his companion a ride.

It is thus apparent that there were positive in-court identifications of Moore as the slayer by the waitress Hill and by the customer Powell, and that there were in-court identifications of Moore as having been present at the bar in Dolton two days later by Sanders, by Fair, and by Joyce.

H. Six months after the slaying, in the early morning hours of October 31, 1962, a Chicago police officer was shot at from a 1957 Ford automobile. Two men fled the scene. The police "staked out" the car, and several hours later Moore and a moustached man, later identified as Jerry Barbee, were arrested when they approached and entered the vehicle. The automobile proved to be owned by Barbee. A fully loaded sawed-off 16-gauge shotgun was in the car.[1] The shotgun was introduced in evidence at Moore's trial.[2] The State conceded that the gun so introduced was not the murder weapon, and that the State's ballistics technician, if called, would testify that the waddings taken from Zitek's body came, in his opinion, from a 12-gauge shotgun shell.

I. The defense called manager Anderson of the Westmoreland Country Club as a witness. He testified that Moore had been hired as a waiter there on April 24 (the day before the murder); that the club records indicated there was a special party at the club on the evening of April 25; and that Moore was paid for work-

[1] This early morning incident was recounted in an earlier trial of Moore and Barbee for an armed robbery at Harvey, Illinois, on July 27, 1962. *People* v. *Moore*, 35 Ill. 2d 399, 401–402, 220 N. E. 2d 443, 444–445 (1966), cert. denied, 389 U. S. 861 (1967).

[2] A revolver found at Moore's feet at the time of his arrest and a shoulder holster then on his person were ruled inadmissible.

ing until sometime between 10 p. m. and midnight. The club's bartender testified to the same effect. Each of these witnesses nevertheless admitted that he could not remember seeing Moore at the club that night, but said that he would have known if he had been absent for any substantial period of time. The club records also indicated that Moore worked at the club the afternoon of April 27, when, according to the testimony of Sanders, Fair, and Joyce, Moore was at the Ponderosa Tap in Dolton.[3]

J. O'Brien, a customer at Zitek's, testified for the defense that he observed Zitek eject two men the evening of the 25th, and that Moore was not one of them. Although he was in the restaurant at the time of the homicide, he did not see the person who shot Zitek. A police officer testified that in his opinion O'Brien was drunk at the time.

III

Prior to the trial, the defense moved for disclosure of all written statements taken by the police from any witness. The State agreed to furnish existing statements of prosecution witnesses. At the post-conviction hearing, Moore argued, and the claim is presented here, that he was denied a fair trial because six items of evidence, unknown to him at the time of the trial, were not produced and, in fact, were suppressed by the State:

A. On April 30, 1962, Sanders gave a statement to the police that he had met the man "Slick" for the first time "about six months ago" in Wanda and Del's tavern. Testimony at the post-conviction hearing by Lieutenant Turbin of the Lansing Police Department revealed that at the time of trial the police possessed an FBI report

[3] A like alibi defense was submitted at the earlier armed robbery trial of Moore and Barbee. *People* v. *Moore*, 35 Ill. 2d, at 406, 220 N. E. 2d, at 447.

that Moore was in Leavenworth Penitentiary from 1957 to March 4, 1962. That report thus proved that Sanders could not have met Moore at Wanda and Del's in November 1961. The defense was not given a copy of the statement made by Sanders. The prosecuting attorney asserted at the post-conviction hearing that he did not recall having seen the statement before or during the trial.

B. On the day Sanders gave his statement, that is, on April 30, the police raided Wanda and Del's looking for "Slick." "Slick" was not there, but Jones, the tavern's operator, said that he could identify "Slick." After Moore was arrested, Jones was not asked by the police whether Moore was "Slick." The defense was not advised of the raid until after the trial. At the post-conviction hearing Jones testified that Moore was not "Slick." His testimony, however, was stricken on the ground that it pertained to innocence or guilt and was not admissible upon collateral review.

C. After the raid on Wanda and Del's, the police secured from their files a picture of James E. "Slick" Watts and assigned Lieutenant Turbin the task of finding Watts. His search was unsuccessful. Moore asserts that the attempt to find Watts was not made known to the defense until cross-examination of the Lansing police chief at the post-conviction hearing.

D. After Moore was arrested on October 31, he was photographed by the police. The photograph was shown to William Leon Thompson, the patron of Wanda and Del's. Thompson testified at the post-conviction hearing that he told Lieutenant Turbin that the picture "didn't, to the best of my knowledge, resemble the man that I knew" as "Slick." He identified a picture of Watts as "the Slick I know." Defense counsel testified that through the course of the trial neither the police

nor the prosecutor advised them about Thompson and his disclaimer.

E. At the start of the trial Sanders observed Moore for the first time since the alleged bragging incident at the Ponderosa Tap. Sanders remarked to the prosecuting attorney and to police officers who accompanied him into the courtroom that the person he knew as "Slick" was about 30–40 pounds heavier than Moore and did not wear glasses. One of the officers responded, "Well, you know how the jailhouse beans are." Moore contends that he and defense counsel were not advised of this remark of Sanders until after the trial had concluded.

F. Mayer, one of the card players at Zitek's at the time of the murder, gave the police a written statement. On the back of the statement Officer Koppitz drew a sketch of the seating arrangement at the card table. The diagram shows that the corners of the table pointed north, south, east, and west. Cardplayer Powell was placed on the southwest side. The bar was about 10 feet north of the table. The door was to the southwest. Moore argues that the diagram is exculpatory and contradicts Powell's testimony that he observed the shooting. Defense counsel testified that they were not shown the diagram during the trial.

Moore argues, as to the first five items, that the State did not comply with the general request by the defense for all written statements given by prosecution witnesses; that the State failed to produce the pretrial statement of Sanders and the other evidence contradicting Sanders' identification of Moore as "Slick"; and that the evidence not produced was material and would have been helpful to his defense.

The Illinois court held that the State had not suppressed material evidence favorable to Moore, that the

record shows that the prosecution presented its entire file to defense counsel, and that no further request for disclosure was made. 42 Ill. 2d, at 80–81, 246 N. E. 2d, at 304. Moore submits here the alternative claim that a specific request is not an "indispensable prerequisite" for the disclosure of exonerating evidence by the State and that the defense could not be expected to make a request for specific evidence that it did not know was in existence.

In *Brady* v. *Maryland*, 373 U. S. 83 (1963), the petitioner and a companion were found guilty by a jury of first-degree murder and were sentenced to death. In his summation to the jury, Brady's counsel conceded that Brady was guilty, but argued that the jury should return its verdict "without capital punishment." Prior to the trial, counsel had requested that the prosecution allow him to examine the codefendant's extra-judicial statements. Some of these were produced, but another, in which the codefendant admitted the actual homicide, was withheld and did not come to Brady's notice until after his conviction. In a post-conviction proceeding, the Maryland Court of Appeals held that this denied Brady due process of law, and remanded the case for retrial on the issue of punishment. This Court affirmed. It held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U. S., at 87.

The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favor-

able character for the defense, and (c) the materiality of the evidence. These are the standards by which the prosecution's conduct in Moore's case is to be measured.

Moore's counsel asked several prosecution witnesses if they had given statements to the police. Each witness (Hill, Powell, Fair) who had given a statement admitted doing so and the statement was immediately tendered. The same inquiry was not made of witness Sanders. He was the only state witness who was not asked the question. At the post-conviction hearing the inquiry was made. Sanders admitted making a statement to the police and the statement was tendered.

The record discloses, as the Illinois court states, 42 Ill. 2d, at 80, 246 N. E. 2d, at 304, that the prosecutor at the trial submitted his entire file to the defense. The prosecutor, however, has no recollection that Sanders' statement was in the file. The statement, therefore, either was in that file and not noted by the defense or it was not in the possession of the prosecution at the trial.

We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case. Here, the elusive "Slick" was an early lead the police abandoned when eyewitnesses to the killing and witnesses to Moore's presence at the Ponderosa were found. Unquestionably, as the State now concedes,[4] Sanders was in error when he indicated to the police that he met Moore at Wanda and Del's about six months prior to April 30, 1962. Moore's incarceration at Leavenworth until March shows that conclusion to have been an instance of mistaken identity. But the mistake was as to the identification of Moore as "Slick," not as to

[4] Brief for Respondent 4; Tr. of Oral Arg. 28.

the presence of Moore at the Ponderosa Tap on April 27.[5] "Sanders' testimony to the effect that it was Moore he spoke with at the Ponderosa Tap in itself is not significantly, if at all, impeached. Indeed, it is buttressed by the testimony of bartender Joyce and operator Fair, both of whom elaborated the incident by their description of the man, and by Moore's request for a ride to Harvey, Illinois, Fair's providing that ride, and Fair's hearing, on that trip, the reference to one of the men as 'Barbee,' " and a second reference to trouble with a bartender in Lansing.

The other four of the first five items—that Jones told police he could identify "Slick" and subsequently testified that Moore was not "Slick"; that the police had a picture of Watts and assigned the lieutenant, unsuccessfully, to find Watts; that Thompson had been shown a picture of Moore and told the police that Moore was not "Slick"; and that on the day of the trial Sanders remarked that the man he knew as "Slick" looked heavier than Moore—are in exactly the same category. They all relate to "Slick," not Moore, and quite naturally go off on Sanders' initial misidentification of "Slick" with Moore.

None of the five items serves to impeach in any way the positive identification by Hill and by Powell of

[5] The dissent observes, *post*, at 804, "When confronted with this fact [Moore's imprisonment at Leavenworth], Sanders indicated that it was impossible that petitioner [Moore] was the man with whom he had spoken in the Ponderosa Tavern." This is a misreading of Sanders' testimony. The question and Sanders' answer were:

"Q. And did you tell me and also later on, did you tell the policeman from the State's Attorney's Office that if you had known that this fellow, Lyman Moore, was in the Federal Penitentiary until March 4, 1962, you would definitely not have identified him as being Slick that you knew?

"A. If he's in jail, it would have been impossible to be the same man." Abstract of Record 296.

Moore as Zitek's killer, or the testimony of Fair and Joyce that Moore was at the Ponderosa Tap on April 27, or the testimony of Fair that the moustached Barbee was accompanying Moore at that time, and that one of the two men made the additional and undisputed admission on the ride to Harvey. We conclude, in the light of all the evidence, that Sanders' misidentification of Moore as Slick was not material to the issue of guilt.

The remaining claim of suppression relates to the diagram on the back of Mayer's statement to the police.[6] Moore contends that the diagram shows that Powell was seated with his back to the entrance to Zitek's and, thus, necessarily contradicts his testimony that he was looking toward the entrance as he sat at the card table, and that the State knowingly permitted false testimony to remain uncorrected, in violation of *Napue* v. *Illinois,* 360 U. S. 264 (1959).

In *Napue* the principal prosecution witness at Napue's murder trial was an accomplice then serving a sentence for the crime. He testified, in response to an inquiry by the prosecutor, that he had received no promise of consideration in return for his testimony. In fact, the prosecutor had promised him consideration, but he did nothing to correct the witness' false testimony. This Court held that the failure of the prosecutor to correct the testimony, which he knew to be false, denied Napue due process of law, and that this was so even though the false testimony went only to the credibility of the witness. See

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[6] Contrary to the assertion by the dissent that the Mayer statement, with its accompanying diagram, was never made available to the defense, *post,* at 803 and 809, the trial transcript indicates that during the cross-examination of Officer Koppitz a request was made by the defense for all written statements taken by the officer from persons in Zitek's restaurant at the time of the shooting. The court granted the request and the record recites that statements of Mayer and others were furnished to defense counsel.

also *Miller* v. *Pate*, 386 U. S. 1 (1967), and *Alcorta* v. *Texas*, 355 U. S. 28 (1957).

We are not persuaded that the diagram shows that Powell's testimony was false. The officer who drew the diagram testified at the post-conviction hearing that it did not indicate the direction in which Powell was facing or looking at the time of the shooting. Powell testified that his position at the table gave him a view of the bartender; that at the moment he could not bid in the pinochle game and had laid his hand down and was looking toward the door when Moore walked in. There is nothing in the diagram to indicate that Powell was looking in another direction or that it was impossible for him to see the nearby door from his seat at the card table. Furthermore, after the shooting he pursued Moore but stopped when the man warned him that he, too, might be shot.

In summary, the background presence of the elusive "Slick," while somewhat confusing, is at most an insignificant factor. The attempt to identify Moore as "Slick" encountered difficulty, but nothing served to destroy the two-witness identification of Moore as Zitek's assailant, the three-witness identification of Moore as present at the Ponderosa Tap, the two-witness identification of Moore as one of the men who requested and obtained a ride from the Ponderosa in Dolton to Harvey, Illinois, and Fair's testimony as to the admission made on that ride.

We adhere to the principles of *Brady* and *Napue*, but hold that the present record embraces no violation of those principles.

IV

The 16-gauge shotgun was admitted into evidence at the trial over the objection of the defense that it was not the murder weapon, that it had no connection with the crime charged, and that it was inadmissible under Illinois

law.[7] During his closing argument to the jury, the prosecuting attorney stated that the 16-gauge shotgun was not used to kill Zitek,[8] but that Moore and his companion, Barbee, were "the kind of people that use shotguns." [9]

The Supreme Court of Illinois held that the shotgun was properly admitted into evidence as a weapon in Moore's possession at the time of his arrest, and was a weapon "suitable for the commission of the crime charged . . . even though there is no showing that it was the actual weapon used." 42 Ill. 2d, at 78, 246 N. E. 2d, at 303. Moore claims that the gun's introduction denied him due process.

Of course, the issue whether the shotgun was properly admitted into evidence under Illinois law is not subject to review here. The due process claim, however, appears to be raised for the first time before us. There is no claim by Moore, and there is nothing in the record to disclose, that due process was argued in the state courts. We could conclude, therefore, that the issue is not one properly presented for review.

In any event, we are unable to conclude that the shotgun's introduction deprived Moore of the due process of law guaranteed him by the Fourteenth Amendment. The 16-gauge shotgun, found in the car, was in the constructive possession of both Moore and Barbee when they were arrested after the shooting incident on October 31. There is substantial other evidence in the record

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[7] See n. 2.

[8] Curiously, the State argues in this Court that it is possible that the 16-gauge shotgun was the murder weapon. Brief for Respondent 20–21.

[9] Later in his closing argument the prosecuting attorney referred to the 16-gauge shotgun and stated again that a 12-gauge shotgun killed Zitek. He argued that a shotgun is not "the most humane type weapon" and that the death penalty is appropriate in a case in which a shotgun is used to murder a person.

that a shotgun was used to kill Zitek, and that he suffered the wounds one would expect from a shotgun fired at close range. The testimony as to the murder itself, with all the details as to the shotgun wounds, is such that we cannot say that the presentation of the shotgun was so irrelevant or so inflammatory that Moore was denied a fair trial. The case is not federally reversible on this ground.

V

Inasmuch as the Court today has ruled that the imposition of the death penalty under statutes such as those of Illinois is violative of the Eighth and Fourteenth Amendments, *Furman* v. *Georgia, ante,* p. 238, it is unnecessary for us to consider the claim of noncompliance with the *Witherspoon* standards. In *Witherspoon,* 391 U. S., at 523 in n. 21, the Court stated specifically "Nor, finally, does today's holding render invalid the *conviction,* as opposed to the *sentence,* in this or any other case" (emphasis in original). The sentence of death, however, may not now be imposed.

The judgment, insofar as it imposes the death sentence, is reversed, *Furman* v. *Georgia, supra,* and the case is remanded for further proceedings.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE STEWART, and MR. JUSTICE POWELL join, concurring in part and dissenting in part.

Petitioner was convicted of murder in the Illinois state courts and sentenced to death. The Supreme Court of Illinois affirmed the conviction and sentence by a divided court. 42 Ill. 2d 73, 246 N. E. 2d 299 (1969). This Court holds that the imposition of the death sentence violated the principle established today in *Furman* v. *Georgia, ante,* p. 238, and that the sentence must be vacated, but the Court upholds the underlying conviction. I agree with the majority that the sentence is invalid and

join Part V of the opinion of the Court. I also agree that the introduction of the shotgun into evidence at petitioner's trial did not violate the Fourteenth Amendment.[1]

But, I believe that in failing to disclose to petitioner certain evidence that might well have been of substantial assistance to the defense, the State denied him a fair trial.

The opinion of the Court relates at some length the facts relating to the crime with which petitioner was charged, the circumstances of his arrest, the course of the trial, and the developments at the post-conviction hearing. As these facts are complicated and quite confus-

[1] I find the constitutional question presented by the introduction of this evidence to be much harder than the majority seems to. It was uncontradicted at trial that the weapon introduced against petitioner had no bearing on the crime with which he was charged. It was, in fact, clear that the shotgun admitted into evidence was a 16-gauge gun, whereas the murder weapon was a 12-gauge gun. Despite the fact that the prosecution conceded this in a pretrial bill of particulars, it did everything possible to obfuscate the fact that the weapon admitted into evidence was not the murder weapon. This was highly improper. The record also indicates that the trial judge was confused as to why he thought the weapon should be admitted. At one point he said, "There was testimony here that this was a shotgun killing. And I can see nothing wrong if they say that this defendant, who will be identified by other people, was apprehended with this gun." Abstract of Record (Abs.), 65. If the trial judge meant to imply that because the crime was committed with a shotgun, it was sufficient to prove that the petitioner possessed *any* shotgun, whether or not it was the murder weapon, he surely erred. But it is impossible to tell from the record in this case precisely what was intended, or whether the judge confused the jury when he admitted the weapon. Although this highly prejudicial and irrelevant evidence was introduced, and although the prosecution did its best to lead the jury to believe that there was a relationship between the murder weapon and the shotgun in evidence, the fact that petitioner's counsel explained to the jury that the two weapons were not identical is, on the very closest balance, enough to warrant our finding that the jury was not improperly misled as to the nature of the evidence before it.

ing, I have not reiterated them here. Rather, I have emphasized those that seem to me to be particularly important and I have added several details that are omitted from the Court's opinion.

Two interrelated defenses were raised against the charge of murder—alibi and misidentification. Petitioner's theory of the case was that he was not at the scene when the murder was committed and that those witnesses who testified that they saw him there were confusing him with someone else.

Only two witnesses affirmatively asserted at trial that they saw the murder and that they could identify petitioner as the assailant. They were Patricia Hill, a waitress in the victim's bar, and Henley Powell, a customer. Aside from their testimony, the only other evidence introduced against petitioner related to statements that he allegedly made two days after the murder.

There is a problem with the eyewitness testimony of Powell that did not become apparent until the post-conviction hearing in the trial court. At trial he testified as follows:

> "The defendant (indicating) came into the tavern while I was at the table. I first saw him when he walked in the door with a shotgun. I was sitting at the table along the wall. I was facing where the bartender was standing and I also had a view of the man that walked in the door. I was looking to the west." Abs. 32.

But at the post-conviction hearing it was discovered that police officers who had investigated the murder possessed a statement by one Charles Mayer, who had been sitting with Powell at a table in the bar, which contained a diagram indicating that Powell was seated in a direction opposite that indicated in his trial testi-

mony. This diagram was never made available to defense counsel.[2]

Donald O'Brien, who had also been seated at Powell and Mayer's table, testified at trial and contradicted the testimony of both Powell and Patricia Hill. Although O'Brien admitted that he did not actually see the shooting because his back was to the bar, he was certain that petitioner was not the man who had been ejected from the victim's bar only an hour before the killing. O'Brien's testimony greatly undercut the apparent retaliatory motive that the prosecution attributed to petitioner.[3]

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[2] It is true, as the Court states, that following the shooting Powell followed the assailant into the street, but it is also true that he never got closer than 50 to 60 feet of the murderer. Abs. 32. The strength of his testimony lay in the alleged opportunity he had for close observation of the murderer while the crime was committed.

Footnote 6 of the Court's opinion implies that during the trial the prosecution turned over Mayer's diagram to defense counsel. But there is absolutely no support for this implication in the record. While it is true that the diagram was drawn on the back of the original statement given by Mayer to the police, there is nothing to indicate that it was ever recopied and made a part of any reproductions of Mayer's statement. All indications are that it was not reproduced. At the post-conviction hearing the following testimony was adduced: the police officer who aided the prosecution at trial indicated that he had the original diagram in *his file*, Abs. 244–249; the two lawyers who had represented petitioner at trial both swore that they were given only Mayer's statement, not his diagram, Abs. 307, 328; and the prosecutor testified that he did not know for sure whether he gave the diagram to defense counsel, but that it was certain that he did not supply the diagram if it was not in his file. Abs. 324. Since the diagram was in the police officer's file, not the prosecutor's, it is clear that it was never made available to defense counsel, even though the prosecutor was aware of its contents. See *infra*, at 809.

[3] The Court asserts that O'Brien may have been drunk. His testimony at trial made it clear beyond doubt that when the victim ejected the man alleged to be the petitioner from the bar, this wit-

Because of the contradictory testimony of those persons who were present at the scene of the murder, the statements allegedly made by the petitioner after the crime were crucial to the prosecution's case. The key prosecution witness in this regard was Virgle Sanders. He testified that two days after the murder he was in the Ponderosa Tavern, that petitioner (whom he knew as "Slick") was there also, and that petitioner said "[s]omething about it's season or open season on bartenders or something like that." Abs. 44. The bartender also testified that he recognized petitioner as being present at the same time as Sanders. And the owner of the tavern stated that he gave petitioner and petitioner's friend a short ride in his automobile, at the end of which the friend mentioned something about "trouble with the bartender." Abs. 52.

After his trial and conviction petitioner learned that five days after the murder, Sanders gave a statement to the police in which he said that he had met "Slick" for the first time about six months before he spoke to him in the Ponderosa Tavern. As the Court notes, it would have been impossible for Sanders to have met the petitioner at the time specified, because petitioner was in federal prison at that time. At the post-conviction hearing, Sanders said that he was not positive when he first met the man known as "Slick," but that he definitely knew it was before Christmas 1961. Petitioner was not released from federal custody until March 1962. When confronted with this fact, Sanders indicated that it was impossible that petitioner was the man with whom he had spoken in the Ponderosa Tavern. Abs. 296. Sanders' trial identification was further impeached at the post-trial hearing by testimony that on

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ness was perfectly sober. Later, especially after the killing, the witness drank heavily and became intoxicated. No one contradicted this at trial.

the day of trial he told police officers that petitioner was approximately 30 or 40 pounds lighter than he remembered "Slick" being. Abs. 294.

Sanders' testimony that petitioner and "Slick" were not one and the same was corroborated at the hearing. The reason that Sanders could remember the first time that he had met "Slick" was that "Slick" had been involved in a scuffle with one William Thompson. Thompson testified at the hearing that he remembered the altercation, that he knew "Slick," that prior to the trial he had told police officers that petitioner was not "Slick," and that he remained certain that petitioner and "Slick" were different people. Finally, Sanders' testimony was corroborated by Delbert Jones, the owner of the tavern where "Slick" and Thompson scuffled. Jones testified that he was certain that petitioner was not the man known as "Slick."

The fact is that Thompson and Jones were both familiar with one James E. Watts, whom they knew as "Slick," and who looked very much like the petitioner. The record makes clear that the police suspected Watts as the murderer and assigned a lieutenant to search for him. A raid of Jones' bar was even made in the hope of finding this suspect.

Sanders' testimony at the post-conviction hearing indicates that it was Watts who bragged about the murder, not petitioner. It is true that the bartender and the owner of the Ponderosa Tavern testified at trial that it was petitioner who was in the bar with Sanders, but the bartender had never seen "Slick" before, and the owner was drinking the entire afternoon. Furthermore, the fact remains that petitioner and Watts look very much alike.

Petitioner urges that when the State did not reveal to him Sanders' statement about meeting "Slick" at an earlier time and the corroborative statements of

Thompson and Jones, it denied him due process. The Court answers this by saying that the statements were not material. It is evident from the foregoing that the statements were not merely material to the defense, they were absolutely critical. I find myself in complete agreement with Justice Schaeffer's dissent in the Illinois Supreme Court:

> "The defendant's conviction rests entirely upon identification testimony. The facts developed at the post-conviction hearing seriously impeached, if indeed they did not destroy, Sanders's trial testimony. Had those facts, and the identifications of 'Slick' Watts by Thompson and Jones, been available at the trial, the jury may well have been unwilling to act upon the identifications of Patricia Hill and Henley Powell. Far more is involved in this case, in my opinion, than 'the following up of useless leads and discussions with immaterial witnesses.' Certainly if Sanders's identification was material, the . . . testimony of the other witnesses which destroyed that identification [was] also material. Consequently, I believe that the State's nondisclosure denied the defendant the fundamental fairness guaranteed by the constitution. . . ." 42 Ill. 2d, at 88–89, 246 N. E. 2d, at 308.[4]

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[4] Chief Judge Friendly has noted that when the prosecution fails to disclose evidence whose high value to the defense could not have escaped the prosecutor's attention, "almost by definition the evidence is highly material." *United States* v. *Keogh*, 391 F. 2d 138, 147 (CA2 1968). See also *United States ex rel. Meers* v. *Wilkins*, 326 F. 2d 135 (CA2 1964).

The materiality of the undisclosed evidence in this case cannot be seriously doubted. The State based its case primarily on the eyewitness identifications of petitioner by a witness and patron in the bar. Testimony of this sort based on in-court identification is often viewed with suspicion by juries. See McGowan, Constitutional In-

Petitioner also urges that the failure of the prosecution to disclose the information concerning where the eyewitness Powell was sitting when he allegedly saw petitioner is another instance of suppression of evidence in violation of the Fourteenth Amendment. Had this been the prosecution's only error, I would join the Court in finding the evidence to be immaterial. But if this evidence is considered together with other evidence that was suppressed, it must be apparent that the failure of the prosecution to disclose it contributed to the denial of due process.

Even if material exculpatory evidence was not made available to petitioner, the State argues that because petitioner did not demand to see the evidence, he cannot now complain about nondisclosure. This argument is disingenuous at best.

Prior to trial, petitioner moved for discovery of all statements given to the prosecutor or the police by any witness possessing information relevant to the case. Abs. 5. In explaining why such a broad motion was made, petitioner's counsel stated that, "We want to circumvent the possibility that a witness gets on the stand and says, 'Yes, I made a written statement,' and then the State's Attorney says, 'But no, we don't have it in our possession,' or they say, 'It's in the possession of Orlando Wilson [Superintendent of Police, Chicago, Ill.],' or 'The Chief of Police of Lansing.' " Abs. 8. In

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terpretation and Criminal Identification, 12 Wm. & Mary L. Rev. 235, 241–242 (1970). That testimony in this case was subject to serious question: indeed, petitioner premised his defense in large part on a theory of misidentification. Coupled with the contradictory statement made by O'Brien (see *supra*, at 803), the evidence showing that one of the witnesses may not have had an adequate opportunity to observe and that petitioner may have been confused with another person named "Slick" would certainly have been material to the defense's presentation of its case.

response to the motion, the prosecutor guaranteed defense counsel and the court that he would supply defense counsel with statements made either to the police or to the State's Attorney by witnesses who were called to testify at trial. *Ibid.* Based on this representation, the motion for discovery was denied. Never was there any implication by the prosecutor that his guarantee was in any way dependent upon petitioner's making repeated and specific requests for such statements after each witness testified at trial. The prosecutor's guarantee certainly covered Sanders' statement. As for the statements of the bartender and owner of the Ponderosa Tavern and the statement and diagram of Charles Mayer, petitioner clearly demanded to see these things before trial. The prosecution took the position that it was bound to reveal only the statements of witnesses who testified. Hence, it is hard to imagine what sort of further demand petitioner might have made. Moreover, the very fact that petitioner made his motion for extensive discovery placed the prosecution on notice that the defense wished to see all statements by any witness that might be exculpatory. The motion served "the valuable office of flagging the importance of the evidence for the defense and thus impos[ing] on the prosecutor a duty to make a careful check of his files." *United States* v. *Keogh*, 391 F. 2d 138, 147 (CA2 1968).

In my view, both *Brady* v. *Maryland*, 373 U. S. 83 (1963), and *Napue* v. *Illinois*, 360 U. S. 264 (1959), require that the conviction in this case be reversed. *Napue* establishes that the Fourteenth Amendment is violated "when the State, although not soliciting false evidence, allows it to go uncorrected." *Id.*, at 269. And *Brady* holds that suppression of material evidence requires a new trial "irrespective of the good faith or bad faith of the prosecution." *Supra*, at 87. There can be no doubt that there was suppression of evidence by the State and

that the evidence that the State relied on was "false" in the sense that it was incomplete and misleading.

Both before and during the trial the prosecutor met with Sanders and went over the statement that he had given the police five days after the murder. Abs. 301, 315. Thus, it is apparent that the prosecutor not only knew of the statement, but was actively using it to prepare his case. There was also testimony at the post-conviction hearing from the prosecution that it had discussed the location where Powell was sitting when he allegedly saw the murder. While the prosecutor could not remember whether or not he actually had Mayer's statement and diagram in his possession, he had some recollection that before trial he was informed of exactly where everyone at Powell's table was sitting. Abs. 323. No attempt was ever made at trial to communicate this information to the defense.

Moreover, seated at the prosecutor's table throughout the trial was Police Lieutenant Turbin, who had investigated the case and who was assisting the prosecution. At the post-conviction hearing, he testified that throughout the trial he was not only aware of Sanders' statement and Mayer's diagram, but also that he had them in his file. He made no attempt to communicate his information to the prosecutor or to remind him about the evidence.

When the State possesses information that might well exonerate a defendant in a criminal case, it has an affirmative duty to disclose that information. While frivolous information and useless leads can be ignored, if evidence is clearly relevant and helpful to the defense, it must be disclosed.

Obviously some burden is placed on the shoulders of the prosecutor when he is required to be responsible for those persons who are directly assisting him in bringing an accused to justice. But this burden is the essence

of due process of law. It is the State that tries a man, and it is the State that must insure that the trial is fair. "A citizen has the right to expect fair dealing from his government, see *Vitarelli* v. *Seaton*, 359 U. S. 535, and this entails . . . treating the government as a unit rather than as an amalgam of separate entities." *S&E Contractors, Inc.* v. *United States*, 406 U. S. 1, 10 (1972). "The prosecutor's office is an entity and as such it is the spokesman for the Government." *Giglio* v. *United States*, 405 U. S. 150, 154 (1972).[5] See also *Santobello* v. *New York*, 404 U. S. 257, 262 (1971); *Barker* v. *Wingo*, 407 U. S. 514 (1972).

My reading of the case leads me to conclude that the prosecutor knew that evidence existed that might help the defense, that the defense had asked to see it, and that it was never disclosed. It makes no difference whatever whether the evidence that was suppressed was found in the file of a police officer who directly aided the prosecution or in the file of the prosecutor himself. When the prosecutor consciously uses police officers as part of the prosecutorial team, those officers may not conceal evidence that the prosecutor himself would have a duty to disclose. It would be unconscionable to permit a prosecutor to adduce evidence demonstrating guilt without also requiring that he bear the responsibility of producing all known and relevant evidence tending to show innocence.

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[5] In the recent decision in *Kastigar* v. *United States*, 406 U. S. 441 (1972), holding that use immunity was co-extensive with the Fifth Amendment privilege against self-incrimination, the Court noted that prosecutors may be responsible for actions of police officers enlisted to aid a prosecution.

PORT OF PORTLAND ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

No. 70–31. Argued October 20, 1971—Decided June 29, 1972

The Spokane, Portland & Seattle Railway Co. (SP&S), a subsidiary of Burlington Northern, and the Union Pacific (UP), sought Interstate Commerce Commission (ICC) approval under § 5 (2) of the Interstate Commerce Act of a joint acquisition of control of the Peninsula Terminal Co. (Peninsula), whose tracks provide an access route to Rivergate, an industrial complex being developed by the Port of Portland, Oregon. Peninsula would continue to operate as a separate carrier. The Milwaukee and the Southern Pacific (SP), the two other line-haul carriers serving Portland, sought inclusion as joint purchasers of Peninsula, and trackage rights linking their lines with Peninsula, under §§ 5 (2) (b), (c), and (d) of the Act. SP, by a separate proceeding, also sought trackage linking its lines with Peninsula, under § 3 (5). The ICC (subject to conditions to protect the traffic of the other railroads) approved the purchase of Peninsula by Burlington Northern and UP, but denied the Milwaukee and SP petitions. It concluded that the adverse effects on SP&S and UP of the proposed four-railroad ownership of Peninsula and accompanying trackage rights would outweigh the advantages to SP, Milwaukee, and the Rivergate industries. Milwaukee contends that Condition 24 (a) to the Northern Lines merger, which gave Milwaukee access to the Portland area over the Burlington Northern-SP&S tracks, required that Milwaukee be included in the purchase of Peninsula. *Held:*

1. On the record in this case (which is ambiguous with regard to many factual and procedural issues) it has not been shown that the ICC's order authorizing UP and Burlington Northern alone to acquire Peninsula met the "public interest" standard of § 5 (2). Pp. 834–842.

(a) In stressing the small share in Peninsula's traffic that Milwaukee had before the Northern Lines merger, the ICC ignored any possible increase in that share after Condition 24 (a) took effect. Pp. 839–840.

(b) In announcing a principle of preserving the market shares of the two railroads currently connecting with Peninsula, the ICC failed to explain why it was not taking into account the potentially enormous traffic over Peninsula, should Peninsula become the northern route into Rivergate. Pp. 840–841.

(c) The ICC's denial of inclusion of SP and Milwaukee because their gain would work a corresponding loss to Burlington Northern and UP is not a proper approach under § 5 (2), given the principle that the anticompetitive effects of any § 5 (2) transaction must be explicitly considered. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 83–87. Pp. 841–842.

(d) In view of uncertainties about the northern access to Rivergate—given the physical limitations of Peninsula's present facilities—and the apparent fact that physical operation over Peninsula into Rivergate was not at issue here, approval of the ICC order, with its protective conditions, may still be in the public interest, but the announced grounds for the ICC decision do not comport with the applicable legal principles. See *SEC* v. *Chenery Corp.*, 318 U. S. 80, 87–88. P. 842

2. The denial of trackage rights to SP (on the ground that SP was "not entitled to serve Peninsula or Rivergate") should be reconsidered by the ICC in conjunction with the reappraisal of the § 5 (2) issues. Pp. 843–844.

Reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which all Members joined except POWELL and REHNQUIST, JJ., who took no part in the consideration or decision of the case.

Lofton L. Tatum argued the cause for appellants. With him on the briefs were *Raymond K. Merrill, Warren H. Ploeger, Oglesby H. Young, W. Harney Wilson, James H. Pipkin, Jr., Lee Johnson,* Attorney General of Oregon, *Dale T. Crabtree,* Assistant Attorney General, *Samuel P. Delisi,* and *Brenda P. Murray. Messrs. Merrill* and *Ploeger* filed a brief for appellant Chicago, Milwaukee, St. Paul & Pacific Railroad Co. *Solicitor General Griswold, Acting Assistant Attorney General Comegys,* and *Howard E. Shapiro* filed a brief for the United States in support of appellants.

Fritz R. Kahn argued the cause for appellee the Interstate Commerce Commission. With him on the brief were *Betty Jo Christian* and *Emmanuel H. Smith*. *Hugh L. Biggs, Roger J. Crosby, James Warren Cook, Richard Devers, Randall B. Kester, James H. Anderson,* and *John F. Weisser, Jr.*, filed a brief for appellees Spokane, Portland & Seattle Railway Co. et al.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case involves an order of the Interstate Commerce Commission, issued under § 5 (2) of the Interstate Commerce Act, as amended, 54 Stat. 905, 49 U. S. C. § 5 (2), authorizing the joint acquisition of a heretofore independent switching railroad at Portland, Oregon, by two of the four line-haul railroads serving that city. *Spokane, P. & S. R. Co. and Union Pacific R. Co.*, 334 I. C. C. 419 (1969). The switching railroad, Peninsula Terminal Co., is of current interest to the carriers because it provides an entrance route to the Rivergate Industrial District, a modern industrial and port complex being developed by the appellant, Port of Portland.

The two railroads authorized to acquire Peninsula are the Union Pacific Railway Co. (UP) and the Great Northern Pacific & Burlington Lines, Inc. (Burlington Northern), through its subsidiary, the Spokane, Portland & Seattle Railway Co. (SP&S).[1] The two other line-

[1] SP&S was formerly owned by the Great Northern Railway Co. and the Northern Pacific Railway Co. These two roads merged to become Burlington Northern. See *Northern Lines Merger Cases*, 396 U. S. 491 (1970). SP&S now operates as an integral part of that railroad. Reference to Burlington Northern in this opinion will include its SP&S operation, but SP&S often will be referred to in connection with the proceedings below, where it was the named party.

haul carriers now serving Portland—the Chicago, Milwaukee, St. Paul & Pacific Railroad Co. (Milwaukee) and the Southern Pacific Transportation Co. (SP)—sought to be included as joint purchasers of Peninsula under §§ 5 (2)(b), (c), and (d) of the Act, 49 U. S. C. §§ 5 (2) (b), (c), and (d), and sought trackage rights linking their lines with Peninsula. This appeal arises out of the Commission's denial—in disagreement with its hearing examiner's recommendations—of the petitions of Milwaukee and SP. Together with these two railroads, the Port of Portland and the Public Utility Commissioner of Oregon appeal from the decision of the three-judge District Court affirming, without opinion, the Commission's order. The United States joins the appellants in urging that the judgment below be reversed, while the Commission joins Burlington Northern and UP in urging affirmance. Probable jurisdiction was noted. 401 U. S. 906 (1971).

The question whether the Commission applied the correct legal standards is presented against the background of a complex factual situation—though this is not unusual in the case of railway mergers and acquisitions—and we find it necessary to go into detail concerning the facts and the proceedings prior to the submission of the case here.

I

A. The Rivergate Area and Peninsula's Relation to It

The developing Rivergate Industrial District occupies nearly 3,000 acres at the tip of the peninsula formed by the confluence of the Columbia and Willamette Rivers. Rivergate's six miles of waterfront will provide docksites for direct deepwater access to the Pacific Ocean. The Port of Portland has expended more than five million dollars of public funds for planning, construction, and development, and it is estimated that ultimate pub-

lic and private investment in industrial and port facilities at Rivergate will exceed 500 million dollars.

As conceived by its public developers, the Rivergate complex will be served by a domestic transportation network capable of providing efficient and economical service to and from points throughout the Nation. To achieve this goal, the Port's consultants recommended construction by the Port of an internal rail loop that would connect with existing carriers at the southwestern and eastern corners of Rivergate, thus providing Rivergate industries with direct access to all line-haul carriers serving Portland. At full development—estimated to be 15 years in the future—rail traffic generated by these industries is expected to reach between 500 and 600 cars per day, with a projected annual volume of five million tons of freight.

At present, eight industries [2] occupy about one-tenth of the Rivergate area. Seven of these are located on the west, or Willamette River, side of Rivergate, and are served by tracks owned by the Port of Portland. Outside rail access to this part of Rivergate is provided by tracks extending from UP's Barnes Yard (point 9 on the schematic map appended to this opinion) and connecting with the Port of Portland tracks. Over these external tracks, jointly owned by UP and Burlington Northern, UP provides switching service to the line-haul carriers serving Portland. It is expected that this Barnes Yard route will remain the southwest entrance to Rivergate.

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[2] When the record closed below, the number of industries in Rivergate was five, four of which were located on the Willamette River side of Rivergate. App. 81. By the time the case had reached the Commission, another industry had located on the Willamette River side. According to the Brief for the Interstate Commerce Commission, p. 38, which no one has contradicted, two additional industries have now located on the Willamette River side.

The one other Rivergate industry—the poleyard of the Crown Zellerbach Corporation (Point E on the map)—is located at the easternmost edge of Rivergate, on the Columbia River. Outside rail access is presently provided by Peninsula, which serves, in addition, 13 industries located just southeast of the Rivergate boundary. Peninsula, organized in 1918 to serve a packinghouse facility long since closed, has a main track extending for only 8,000 feet along the Columbia River. At its easternmost end is the North Portland interchange (point 7 on the map), where Peninsula connects with lines owned by Burlington Northern and UP. Since the lines of these two line-haul carriers do not connect directly with Rivergate in this area, access to the eastern end of the Rivergate District is, at present, solely over Peninsula tracks.

Whether Peninsula tracks will remain the sole access to the eastern end of Rivergate is by no means certain. Peninsula suffers from certain physical limitations—its tracks are laid upon sand, its clearances are limited, and the main line is impeded by heavy curvature. Furthermore, the North Portland interchange tracks may have insufficient capacity for the expected Rivergate traffic. Accordingly, an alternate access route to the eastern end of Rivergate is under consideration, that is, a new spur leading directly to Rivergate from the Burlington Northern main north-south tracks.[3]

B. The Proposed Purchase of Peninsula

All outstanding capital stock of Peninsula is owned by the United Stockyards Corporation. *Stockyards R. Co. Control*, 254 I. C. C. 207 (1943). United is not

[3] SP&S and UP had already provided for joint ownership of such a spur in their May 26, 1967, contract for the joint ownership of the line between Barnes Yard and the southwestern part of Rivergate. See Art. XI of this agreement, App. 313.

itself a carrier and has no interest in continuing to operate a railroad independent of its stockyard operation. It has been willing to sell Peninsula at the appraised value of its capital stock, and it has no preference as to the purchaser. On February 28, 1967, United entered into an agreement to sell Peninsula to SP&S and UP.[4]

By joint application filed with the Interstate Commerce Commission on July 25, 1967, SP&S and UP sought approval, under § 5 (2) of the Interstate Commerce Act,[5] of their contracted purchase of Peninsula

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[4] The agreed purchase price is $299,405 for all outstanding shares of common stock of Peninsula plus the sum of $70,000 to reimburse United for two switch engines sold by United to Peninsula, and representing an unsecured account payable to United. Peninsula's properties consist of 13.17 acres of land, none suitable for industrial development, and a total of 3.79 miles of main line and secondary and spur track laid on treated ties in sand with no rock ballast. Besides the two above-noted locomotives, including tools and parts for their operation and maintenance, Peninsula owns tools for track maintenance, a conveyance for workmen, a heated engine house for both locomotives, a yard office, and a sand house.

[5] Section 5 (2) of the Act, 49 U. S. C. § 5 (2), provides in pertinent part:

"(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

"(i) for . . . two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise . . . .

. . . . . .

"(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission . . . shall afford reasonable opportunity for interested parties to be heard. . . . [A] public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public

from United Stockyards. The application pointed out that the acquisition would enable the applicants to provide rail service to the adjacent Rivergate area over the Peninsula tracks. Peninsula, however, would continue to operate as a separate carrier. No major changes in traffic or revenues were anticipated in the immediate future, though it was anticipated that "within the foreseeable future substantial new traffic and revenues" would be derived from the developing Rivergate area.

In response to the above application, Milwaukee and SP filed petitions seeking inclusion in the acquisition of Peninsula as joint and equal owners, pursuant to §§ 5 (2)(b), (c), and (d) of the Act; in addition, they sought the right to use tracks necessary to connect their own lines with Peninsula. The Commission's action on these petitions is the subject of the present appeal. The competing contentions are closely related to the facts of the interconnections between the four line-haul carriers near Rivergate, and to these we now turn.

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interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable . . . .

"(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

"(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest."

C. Carrier Interconnections and Switching Arrangements

(1) The North Portland Interchange

At the North Portland interchange (point 7 on the map), where Peninsula connects with Burlington Northern and UP, are four interchange tracks. Two of these are jointly owned by Burlington Northern and UP; the remaining two are owned half by Peninsula, and the other half jointly by Burlington Northern and UP. Only one of these four tracks—one of the two jointly owned by Burlington Northern and UP—connects directly to the Burlington Northern double main-line tracks, running to the north across the Columbia River. In addition, the interchange tracks connect to a single UP track, which extends south through a mile-long tunnel to the UP's Albina Yard (point 6 on the map), a distance of 5.2 miles.[6]

At the time of the hearing in this case, about 30 cars were handled daily at the North Portland interchange. About 61% of this traffic involved switching between the predecessors of Burlington Northern on the one hand and UP and its subsidiaries on the other. Only the remaining 39% involved switching cars designated to or from industries served by Peninsula.[7] As the only two line-haul carriers connecting

[6] Although the map reproduced in the Appendix does not make this clear, trains coming north on the UP track from Albina Yard may enter directly upon the Burlington Northern double main-line tracks just south of North Portland, without passing through the North Portland interchange.

[7] These percentages are based on the figures for loaded or partly loaded cars interchanged at Peninsula during 1967: 2,748 cars designated to or from Peninsula industries; 4,300 interchanged between UP and the predecessors of Burlington Northern. It is not clear from the record how the total figure of 7,048 cars is translated into 30 cars per day—perhaps empty cars are included—but none of the parties disputed the daily or annual figures.

directly with Peninsula at North Portland, Burlington Northern and UP provide reciprocal switching to any other line-haul carrier whose cars are designated to or from industries served by Peninsula.[8]

(2) The Southern Pacific Connection

Although SP is a line-haul carrier serving Portland, its tracks terminate in East Portland (point 5) and at the Hoyt Street Yard on the other side of the Willamette River (point 3). SP cars designated for industries served by Peninsula are generally switched to UP trains at the latter's Albina Yard (point 6) and moved

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[8] In *Switching Charges and Absorption Thereof at Shreveport, La.*, 339 I. C. C. 65, 70 (1971), the Commission has explained "reciprocal switching" as follows:

"It has long been a common practice among the railroads to participate at commonly served terminal areas in what is called reciprocal switching. In practice this means that one line-haul carrier operating within the terminal area will act only as a switching carrier in placing cars at industries on its own trackage for loading or unloading, as an incident of the line-haul movement of those cars over another carrier whose trackage in that terminal area does not extend to the serviced industry. The carriers reciprocate in their roles as switching and line-haul carriers at this terminal in accordance with the flow of traffic to and from industries on their respective trackage. In theory the carriers mutually exchange their switching services in these terminal areas, with the effect of extending the lines of each carrier to the other's industries—even on traffic for which they may be directly competitive as line-haul carriers. The scope of these reciprocal switching services is, of course, defined in the carriers' respective tariffs, either by definition of a specific area of trackage, or by identification of the particular industries for which reciprocal switching is held out. Frequently, the switching charges made applicable by each carrier for reciprocal switching are constructed without regard to the actual cost of the service, on the theory that these mutually incurred costs balance out each other. In many instances the line-haul carrier absorbs the reciprocal switching charge, thus placing the off-line industries within a given terminal area on an identical rate basis with its own on-line industries in that terminal area."

thence to the North Portland interchange, where they are switched by Peninsula itself to their ultimate destination. Alternatively, the cars may be switched to SP&S trains at the Hoyt Street Yard and moved to North Portland over the SP&S mainline. In either case, SP must pay a switching charge to Burlington Northern or to UP (whichever is the switching carrier), and then pay a "rate division" to Peninsula for its switching service.[9] The Peninsula rate division is absorbed by any line-haul carrier subject to it and is thus not passed on to the shipper. The SP&S and UP switching charges may be absorbed by a line-haul carrier if a minimum line-haul revenue per car is exceeded, and SP has done so, except on certain low-rated noncompetitive traffic. SP shared in about 20% of Peninsula's traffic in 1966, and in about 17% in 1967.

(3) Milwaukee's Presence in Portland

Throughout the proceedings below, Milwaukee was not a line-haul carrier serving Portland. Its own tracks terminate at Longview, Washington, 46 miles north of Portland, and through arrangements with SP&S it shared in only one percent of Peninsula's traffic in 1966 and 1967. However, a basic condition of the Commission's approval of the merger of the Great Northern Railway Co., the Northern Pacific Railway Company, and their affiliates, including SP&S, was that Milwaukee be made an effectively competitive transcontinental carrier by being permitted to enter Portland over the lines of the new company, Burlington Northern.[10] Condition

[9] In other words, Peninsula is compensated for its switching service in these cases by a flat division of the line-haul rates. At the time of hearing below, the charge generally amounted to $29.25 per car when the car revenue exceeded $60. App. 79.

[10] The Commission approved the merger on November 30, 1967. *Great Northern Pacific & Burlington Line, Inc.—Merger, etc.—Great Northern R. Co. et al.*, 331 I. C. C. 228, modified Apr. 11, 1968,

24(a) of the merger required that Burlington Northern

> "shall grant to the Milwaukee, upon such fair and reasonable terms as the parties may agree or as determined by this Commission in the event of their inability to agree, trackage rights to operate freight trains over [Burlington Northern] lines between Longview Junction and Portland, including the right to serve on an equal basis all present and future industries at Portland and intermediate points and the use of [Burlington Northern] facilities at Portland necessary for the switching of traffic to other railroads and industries. [Burlington Northern] shall maintain Portland as an open gateway on a reciprocal basis with the Milwaukee to the same extent as with other connecting carriers . . . ." 331 I. C. C. 228, 357.

Pursuant to Condition 24(a), Milwaukee commenced service to Portland on March 22, 1971.[11] Since that

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331 I. C. C. 869. This Court ultimately affirmed. *Northern Lines Merger Cases*, 396 U. S. 491 (1970).

Why direct access to Portland was critical to the Milwaukee is made clear by the following quotation from the three-judge District Court opinion in what became the *Northern Lines Merger Cases:*

"Neither Great Northern nor Northern Pacific would interchange traffic with Milwaukee [at Longview, Washington] except in circumstances which gave Northern Lines the longest possible haul over their own roads. This privilege of Northern Lines not to 'shorthaul' themselves means that traffic originating on the Milwaukee east of of the Twin Cities [and] destined for Portland or California was required to be turned over to one of the merging lines at the Twin Cities. As a consequence, Milwaukee was precluded from being a true transcontinental competitor and was unable to make full use of its extensive trackage ending only a few miles short of Portland. Moreover, Milwaukee was completely precluded from the extensive North-South traffic on the West Coast." 296 F. Supp. 853, 865 (DC 1968).

[11] Since the instant case was litigated below on the express assumption that the Northern Lines merger, and the accompanying condi-

date, it has published rates reflecting single-line service to Portland industries, including those served by Peninsula, by absorbing the relevant switching charges. It has operated its own locomotives over Burlington Northern lines as far south as the Hoyt Street Yard on the western side of the Willamette River (point 3). If Milwaukee is not allowed to switch cars directly to Peninsula at the North Portland interchange, Milwaukee cars designated for industries on Peninsula will be switched to Burlington Northern trains at Vancouver, on the north side of the Columbia (point 8), at the Hoyt Street Yard (point 3), or at the Guild's Lake Yard (point 2), and moved thence to Peninsula.[12]

D. Milwaukee and Southern Pacific Pleadings Before the Commission

By petition filed August 23, 1967, Milwaukee sought inclusion in the proposed purchase of Peninsula by Burlington Northern (then SP&S) and UP. Section 5 (2)(d) of the Interstate Commerce Act authorizes the Commission to require such inclusion as a prerequisite to its approval of the purchase "upon a finding that such inclusion is consistent with the public interest." After first setting out its impending access to Portland over SP&S lines because of the Northern Lines merger, Milwaukee alleged:

> "The instant transaction, if approved by the Commission without inclusion of Milwaukee upon the terms stated below, would have the effect of

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tion, would ultimately be affirmed, the Milwaukee's current operation does not constitute a "change in circumstances" so much as a realization of the assumption.

[12] The briefs do not clearly reflect under what arrangements Milwaukee cars have been reaching Peninsula since March 22, 1971, though it is plain that Milwaukee trains have not been moving directly to the North Portland interchange.

> foreclosing Milwaukee direct service to all the industries now or in the future to be located on the lines of Peninsula Terminal Company. With fifty per cent of Peninsula Terminal Company stock in the hands of Union Pacific Railroad Company, not a party to the contract referred to above, Milwaukee will not have any right similar to that sought by applicants herein . . . to operate over or obtain trackage rights in the lines of Peninsula Terminal Company. Industries on the lines of Peninsula Terminal Company will thus be denied the single-line service of Milwaukee to such points as [various western and midwestern rail centers served by Milwaukee], contrary to the public interest." [13] App. 165.

Accordingly, the Milwaukee sought equal inclusion with SP&S and UP in the purchase of Peninsula and, in addition, asked

> "[t]hat Milwaukee be granted the right to acquire trackage rights over intervening connecting trackage jointly owned by applicants, from SP&S main line to Peninsula Terminal Company's lines upon such reasonable terms and conditions, and for such considerations, as Milwaukee and applicants may negotiate, or, failing such negotiations, upon such

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[13] The contract here referred to is a 1966 agreement between Milwaukee and the Northern Lines, the terms of which were incorporated in large part into the Commission's conditions accompanying the approval of the Northern Lines merger. In particular, the agreement provided that Milwaukee could operate over SP&S lines as far south as the Hoyt St. Yard, and that SP&S would provide switching of Milwaukee cars at Vancouver and Portland "to or from industries and connecting carriers to the extent such service is performed by [Burlington Northern] or SP&S for itself or any other carrier." These provisions were the direct predecessors of the vaguer Condition 24 (a), quoted above.

terms and conditions and for such consideration as the Commission may find just and reasonable." [14] App. 166.

On December 29, 1967, SP&S and the UP filed replies, arguing, *inter alia:* (1) that even if Condition 24 (a) were implemented, Milwaukee would still not connect with Peninsula because of the intervening North Portland interchange tracks, jointly owned by SP&S, UP, and Peninsula, and trackage rights over these tracks could not be granted to the Milwaukee in this proceeding; and (2) that joint ownership of Peninsula with the Milwaukee could "lead to a cumbersome, confused and divided management with resulting policy stalemates and serious deterioration of service."

Milwaukee thereupon filed a supplement to its petition for inclusion, stating that

> "in light of the replies of applicants herein to the Milwaukee's petition for inclusion, the Milwaukee alleges that the joint application herein is for the purpose of bottling up the Milwaukee at Portland and impair [*sic*] its ability to provide a competitive service to industries served or to be served by Peninsula Terminal Company contrary to the public interest and the plain intent of the Commission's [report and order in the *Northern Lines Merger Case*]." App. 182.

Accordingly, the Milwaukee added to its earlier petition by requesting:

> "That applicants be required to grant Milwaukee trackage rights over intervening trackage at North

[14] A source of confusion in this case has been the extent to which various carriers either would possess or sought to possess trackage rights over Peninsula's main track (as opposed to the interchange tracks at North Portland), so the reader is alerted to tread carefully through the descriptions of the pleadings and the opinions below.

> Portland connecting with the yards of Peninsula Terminal Company, both as a condition to participation in ownership of Peninsula Terminal Company *and also under Section 3 (5) of the Interstate Commerce Act.*" App. 183. (Emphasis added.)

Whether intentionally or not, by requesting trackage rights under § 3 (5), the text of which appears in the margin,[15] Milwaukee divorced the question of *access* to Peninsula from the question of *inclusion in the ownership* of Peninsula. Any trackage rights granted in connection with the petition for inclusion under § 5 (2) would be contingent upon SP&S' and UP's deciding to consummate the purchase; trackage rights granted under § 3 (5), however, would be independent of the purchase.

In the meantime, by an amended petition filed November 29, 1967, SP joined with the Milwaukee in seeking inclusion under § 5 (2)(d) as an equal owner of Peninsula. It further requested that UP

> "be required to grant petitioner bridge trackage rights over [the Union Pacific] main line and terminal trackage between Peninsula Terminal Com-

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[15] Section 3 (5) of the Act, 49 U. S. C. § 3 (5), provides in pertinent part:

"If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. . . ."

pany and the Southern Pacific-Union Pacific track connection at East Portland, Ore." [16] App. 168.

In response to replies that trackage rights to East Portland could not be granted in a § 5 (2) proceeding, SP, unlike Milwaukee, initiated separate proceedings under § 3 (5) (Dec. 19, 1967). It sought orders requiring SP&S and UP to allow the "common use of Peninsula Terminal Company," together with bridge trackage rights over UP lines to East Portland; additionally (or, presumably, alternatively), it sought the "common use of the terminal facilities of Union Pacific between Peninsula Terminal Company and . . . East Portland, Oregon." [17]

E. Proceedings Before the Hearing Examiner

The applications, petitions, and replies of the four line-haul carriers were referred to an examiner for hearing upon a consolidated record. The Port of Portland, the Portland Commission of Public Docks, the Public Utility Commissioner of Oregon, and Crown Zellerbach Corporation intervened in favor of Milwaukee and the

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[16] We are told that "bridge trackage rights," permitting SP only to haul cars from one end of the line to the other, are to be contrasted with "full user rights" or "common use," which would permit SP to serve any industries located along the UP track. See Brief for Appellees SP&S and UP 27.

[17] Like Milwaukee, SP had mentioned § 3 (5) in connection with its § 5 (2) petition for inclusion, asking for

"trackage rights between East Portland and the yards of Peninsula Terminal Company, both as a condition to participation in ownership of Peninsula Terminal Company, and also under section 3 (5) . . . , independently of the request for participation in ownership." App. 169.

The hearing examiner and the Commission treated this § 3 (5) request as having been superseded by SP's separate § 3 (5) proceedings, which, if anything, sought broader relief. We do likewise.

SP.[18] At the hearings in February and March of 1968, evidence was taken from five shippers in addition to Crown Zellerbach, as well as officers and consultants of the parties and intervenors.

On September 9, 1968, nearly a year after the Commission had approved the Northern Lines merger, the hearing examiner issued his report. In the § 5 (2) proceeding, he recommended approval of the purchase of Peninsula by Burlington Northern and UP, on condition (1) that SP be included as an equal owner and (2) that Milwaukee be included as an equal owner upon consummation of the Northern Lines merger and upon Milwaukee's commencing operations into Portland.[19] The examiner further recommended that if the purchase were consummated on the above conditions, SP and Milwaukee be granted

> "the right of access . . . to Peninsula Terminal Company trackage over intervening North Portland interchange tracks, at North Portland, Oreg., presently owned individually or jointly by [Peninsula, SP&S and Northern Pacific, and UP], upon such terms and compensation for use of such inter-

[18] Eight railway employee organizations opposed the petitions and applications of Milwaukee and SP. None of their contentions are before us now.

[19] In return for inclusion in the purchase of Peninsula, SP and Milwaukee were to be required to make equal contribution to the cost of the shares of capital stock and the locomotive equipment of Peninsula.

Milwaukee's inclusion in the purchase was made contingent, not only on ultimate approval of the Northern Lines merger, but also upon Milwaukee's filing a § 1 (18) request for a "certificate of convenience and necessity authorizing railroad operation between Longview Junction, Wash., and Portland, Oreg." Given Condition 24 (a), the Commission rejected the proposition that a § 1 (18) certificate would be necessary before Milwaukee could begin operating in Portland, and the question is not before us on appeal.

> vening trackage mutually agreeable to the interested carriers, or in the event of failure to agree, as the Commission may fix as just and reasonable, to be ascertained in accordance with the provisions of section 3 (5) . . . ." App. 128–129.

The examiner found that this right of access "is practicable and would not substantially impair the ability of the owning carriers to handle their business." [20] App. 129.

In the separate § 3 (5) proceedings initiated by SP, the examiner ordered common use by SP of the tracks and facilities of UP for operation between the connection at East Portland and the tracks of Peninsula at North Portland, conditioned, again, upon compensation to be agreed upon by the parties or "just and reasonable" as fixed by the Commission.

In his discussion of the issues, the hearing examiner first announced that he would treat the entire area in-

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[20] Did this § 5 (2) order grant SP the trackage rights it sought from the Albina Yard? SP contended below that it did, arguing that the only individually owned track in the area that was relevant to the issue was the UP track from North Portland to the Albina Yard, and that the examiner did seem to have in mind all *intervening* tracks. To protect itself on this point, however, SP filed an exception to the hearing examiner's recommendations, arguing that he *should* have granted the requested trackage rights under § 5 (2).

As for Milwaukee's apparent effort to claim a § 3 (5) right to trackage over the North Portland interchange tracks, see Milwaukee's Supplement to Petition for Inclusion, quoted *supra*, we can only say that it was handled very ambiguously by the hearing examiner. The best explanation of his action is that he deemed it unnecessary to grant trackage rights to Milwaukee under § 3 (5), since he was granting them under § 5 (2). Alternatively, he may have thought that Condition 24 (a) gave Milwaukee trackage rights over the North Portland interchange. Milwaukee did not file an exception on this issue and has not pressed it on this appeal. Cf. Brief for Appellants 34.

volved as "one transportation terminal entity." On the subject of inclusion in the purchase of Peninsula, he announced:

> "Existing disparity in charges and treatment of traffic within the Portland switching area is convincing evidence that the greatest economic advantage for equality of shippers and carriers can be accomplished best by equal access and ownership. The most economical and functionally modern transportation facilities are essential to development of Rivergate and the Port of Portland. Limitation of direct access there to two railroads barring on-line solicitation and the direct development interests of the other railroads serving the Portland area is contrary to an environment of unencumbered development and the establishment of a sound transportation system. . . . [D]irect access to all the carriers will enable shippers to deal directly with originating carriers providing on-line service to many points in areas not served by the two initial applicants. Shippers would benefit from elimination of switching charges assessed on non-competitive traffic where one of the applicants now acts as a switching carrier." App. 120–121.

On the subject of the SP's § 3 (5) applications, the examiner found that the evidence warranted a conclusion that common use by SP of UP trackage between the North Portland interchange and East Portland was "in the public interest, practicable, and would not substantially impair UP's ability to handle its own business." He noted the "almost incredible 30-hour average transit time required for car movements between Albina Yard and Peninsula, a round-trip distance of about 10.4 miles, including engine changes, car inspection, and car classification at Albina Yard." With

respect to the developing Rivergate complex, the examiner was convinced

> "that access thereto by other line-haul carriers will create greater incentive for improvement of railroad facilities and for elimination of present unsatisfactory conditions in the involved area." App. 124.

Nor did the examiner think that joint ownership and access by the four line-haul railroads in Peninsula and the proposed trackage rights to SP would curtail competition.

> "To the contrary, shippers in the involved area would be afforded free direct access to all the line-haul carriers' services. Among other things, it would place traffic movements between the Portland area, on the one hand, and, on the other, on-line points of carriers in California and States east thereof, on a more competitive basis with movements between those points over the lines of UP and [Burlington Northern] . . . . Also, Milwaukee would become more competitive with UP and [Burlington Northern] and their connections in providing service to the north and east of Portland. The authorizations, generally, would result in improved competitive service and the fostering of sound transportation in the involved area." App. 125.

Finally, the examiner did not grant SP's apparent application, pursuant to § 3 (5), for trackage rights over Peninsula itself. He concluded his discussion with the words:

> "In event the parties elect not to consummate the purchase [of Peninsula] recommended herein further petitions by these carriers requesting access to and operation over trackage of Peninsula pursuant to

section 3 (5) of the Act may be filed. Jurisdiction will be retained for that purpose." [21] App. 127.

F. The Decision of the Interstate Commerce Commission

Burlington Northern and UP filed exceptions to the hearing examiner's recommendations. They contended, *inter alia,* (1) that undue emphasis was placed on the future development of Rivergate, (2) that the hearing examiner erroneously held the Portland terminal area to constitute one terminal entity, (3) that the evidence does not support a four-way ownership of Peninsula, either from a general public or a shipper standpoint, (4) that Condition 24 (a) did not grant Milwaukee access to Peninsula, and (5) that neither use of the North Portland interchange tracks by Milwaukee and SP, nor common use by the SP of UP trackage between North Portland and East Portland, was in the public interest.[22]

On June 6, 1969, Division 3 of the Interstate Commerce Commission issued its opinion. 334 I. C. C. 419.

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[21] Whether or not SP had in fact sought, under § 3 (5), the right to operate over Peninsula's main track was the subject of strenuous dispute before the hearing examiner. Counsel were unable to agree on the meaning of "common use," so the result of the interchange is not perfectly clear, but SP's counsel appeared to concede that his client sought no more than the right to operate to the North Portland interchange and to connect there with Peninsula (in addition, of course, to equal ownership in the stock of Peninsula). In any event, it is clear that the hearing examiner did *not* recommend granting any right to operate over the Peninsula main track, and we note that SP did not file an exception on this matter.

[22] SP&S and UP contended, in addition, that SP and Milwaukee are not "railroads in the territory involved" within the meaning of § 5 (2) (d), and that the Commission, accordingly, did not have jurisdiction to include these two lines in the purchase of Peninsula. The Commission squarely rejected this contention, and since SP&S and UP do not raise it in their briefs here, we assume that the Commission decided the question correctly and discuss it no further.

Though it approved the acquisition of Peninsula by SP&S and UP, it otherwise rejected the hearing examiner's recommendations and denied the petitions and applications filed by Milwaukee and SP. The following conditions were imposed upon the acquisition, "to protect the present routings and interchanges" of Peninsula:

> "1. Under the control of SP&S and UP, Peninsula shall maintain and keep open all routes and channels of trade via existing junctions and gateways, unless and until otherwise authorized by the Commission;
>
> "2. The present neutrality of handling inbound and outbound traffic to and from Peninsula by SP&S and UP shall be continued so as to permit equal opportunity for service to and from all lines reaching Peninsula through SP&S and UP without discrimination as to routing or movement of traffic, and without discrimination in the arrangements of schedules or otherwise;
>
> "3. The present traffic and operating relationships existing between Peninsula, on the one hand, and, all lines reaching Peninsula through the lines of SP&S and UP, on the other, shall be continued insofar as such matters are within the control of SP&S and UP;
>
> "4. Peninsula, SP&S and/or UP shall accept, handle, and deliver all cars inbound, loaded and empty, without discrimination in promptness or frequency of service irrespective of destination or route of movement;
>
> "5. Peninsula, SP&S and/or UP shall not do anything to restrain or curtail the right of industries, now located on Peninsula, to route traffic over any and all existing routes and gateways;

"6. Peninsula, SP&S and/or UP shall refrain from closing any existing route or channel of trade with SP or Milwaukee on account of the [authorized purchase of Peninsula], unless and until authorized by this Commission;

"7. Consummation of [the authorized purchase of Peninsula] shall constitute assent by the corporate parents of SP&S, the members of their respective systems, and any carrier resulting from consummation of the Northern Lines case, to be bound by these conditions to the same extent that SP&S is bound by these conditions; and

"8. Any party or person having an interest in the subject matter may at any future time make application for such modification of the above-stated conditions, or any of them, as may be required in the public interest, and jurisdiction will be retained to reopen the proceeding on our own motion for the same purpose." 334 I. C. C., at 436–437.

II

A. "Direct Access"

As a reading of Part I reveals, there seems to have been a certain amount of confusion below as to whether or not actual operation over the main tracks of Peninsula by any of the four line-haul carriers was at issue in this case. Early in the Commission's discussion of the merits, for example, it said:

"[W]e find that since neither SP nor Milwaukee now connect with Peninsula, and have never connected with it in the past, *their direct service to Peninsula's industries* over the objections of SP&S and UP would constitute a new operation and an invasion of the joint applicant's territory." 334 I. C. C., at 433 (emphasis added).

Laying aside the substantive policy involved in this statement, we do not see how the italicized words can refer to anything but physical operation over tracks wholly owned by Peninsula. Yet, as we have already seen *supra,* at 828–829, and n. 20, and 832 n. 21, the hearing examiner did not recommend the granting of such trackage rights to Milwaukee and SP; and neither of these two railroads filed exceptions to the hearing examiner's report requesting such rights. As for Burlington Northern and UP, the third condition which the Commission imposed on their purchase of Peninsula (quoted *supra,* at 833) seems to acknowledge that Peninsula will continue to operate as a separate railroad, handling all the switching from industries located upon its lines to the North Portland interchange tracks.

This matter was not resolved before this Court. The briefs filed by the appellants and by the United States contain many references to "direct access" by the line-haul carriers to Peninsula and Rivergate, again strongly suggesting physical operation over Peninsula tracks. The Commission argues that physical operation on the part of Burlington Northern and UP is not at issue, because ownership alone—all that these two railroads seek—gives no right to operate over the tracks of the purchased railroad. Brief for Interstate Commerce Commission 23 n. 15; Tr. of Oral Arg. 30. Milwaukee denies that it ever sought "to switch cars to Peninsula industries with its own engines and crews," Supplemental Brief for Appellant Milwaukee 34, but no similarly direct statement has been forthcoming from SP.

We have set forth but one of the confusions—factual and procedural—that plague this case. Such confusions might have been resolved before the case reached us had the three-judge court that initially reviewed these orders written an opinion.

B. The Petitions for Inclusion

(1) Condition 24 (a)

Milwaukee and the United States argued at length before this Court that Condition 24 (a) of the Northern Lines merger by itself requires that Milwaukee be included in the purchase of Peninsula. The Commission considered this point at the very start of its discussion of the merits and stated that Milwaukee's petition for inclusion could not be viewed

> "as part of the general realignment of western railroad competition resulting from the Commission's approval of the *Northern Lines* merger. Condition No. 24 . . . is applicable only to *Northern Lines* trackage and territory. The condition is silent with respect to trackage and territory in which other carriers, such as UP, have a joint interest and the effect of the condition upon such joint trackage and territory was not presented to, nor considered by, the Commission. Furthermore, . . . the purchase of Peninsula by the joint applicants was not within the contemplation of the Commission at the time condition No. 24 was imposed. . . . Accordingly, we consider the petition of Milwaukee under the same public interest criteria as the petition and applications of SP, rather than as a petition to carry out the provisions of condition No. 24.[10]" 334 I. C. C., at 432.

In its footnote 10, however, the Commission said:

> "Upon completion of litigation in the *Northern Lines* case and consummation of that merger, Milwaukee may wish to seek relief from the Commission in that proceeding to determine the relationship of condition No. 24, if any, to Peninsula's tracks

> which would at that time be partially owned by the Northern Lines." *Ibid.*

This suggestion that the Commission might consider anew the effect of Condition 24 (a) upon jointly owned tracks leaves us in doubt whether at this point it has made a final determination on the applicability of the condition, or simply a determination that the question should be raised in a different proceeding. We do not find it necessary, however, to resolve this doubt and to rule upon the narrow question whether Condition 24 (a) alone requires that Milwaukee be included in the purchase of Peninsula. No one disputes that the condition had one clear meaning—that Milwaukee would be permitted to run its trains into Portland over Burlington Northern-SP&S tracks. The Commission took this as its starting point and went on to discuss the merits of both Milwaukee's and SP's petitions for inclusion. We find, for the reasons that will appear below, that the Commission took too narrow a view of the "public interest" and we are in disagreement with its § 5 (2) order.

(2) Evaluating the Public Interest

As an initial matter, the Commission limited its attention to Peninsula alone, rather than considering the "entire Portland area" as "one transportation terminal entity," as the hearing examiner had. Appellants contend that this very first step was error, but we think it wiser to evaluate the Commission's approach as a whole.

A fair summary of the Commission's analysis appears in the last paragraph of its discussion of the petitions for inclusion. There it concludes:

> "The adverse effect on SP&S and UP, and the shippers dependent upon them for service, of ad-

> mitting SP and Milwaukee into ownership and control of Peninsula, would outweigh any advantage accruing to SP, Milwaukee, and the Rivergate industries of four-railroad ownership. We cannot find, therefore, that inclusion of SP and Milwaukee in the title proceeding would constitute a just and reasonable term, condition, or modification of the authority requested by the joint applicants." 334 I. C. C., at 435.

In the preceding paragraphs, the Commission had summarized the evidence presented by the three shippers located in Rivergate that had supported SP's petition and application; it concluded that this evidence failed to establish that benefits would accrue from four-railroad ownership of Peninsula. No mention was made of evidence that tended to establish that "shippers dependent upon" SP&S and UP would suffer from such ownership. It is apparent, therefore, that the dominant factor in the Commission's analysis, outweighing any advantage accruing to SP and Milwaukee from four-railroad ownership, was the "adverse effect on SP&S and UP"; we must examine now the manner in which the Commission characterized this "adverse effect."

First, the Commission said:

> "[W]e find that since neither SP nor Milwaukee now connect with Peninsula, and have never connected with it in the past, their direct service to Peninsula's industries over the objections of SP&S and UP would constitute a new operation and an invasion of the joint applicant[s'] territory." *Id.*, at 433.

We have already observed that this passage suggests direct physical operation over the main track of Peninsula, a matter that appears not to be directly at issue in this case. But it may also refer to the trackage

rights sought by Milwaukee and SP, as a condition to the purchase, which would permit them to connect directly with Peninsula, so the Commission's further treatment of this point is relevant:

> "In the past, the Commission has usually held that sound economic conditions in the transportation industry require that a railroad now serving a particular territory should normally be accorded the right to transport all traffic therein which it can handle adequately, efficiently, and economically, before a new operation should be authorized. This conclusion is applicable not only with respect to existing traffic but also with respect to potential traffic . . . . See *Minneapolis, St. P. & S. S. M. R. Co. Acquisition,* 295 I. C. C. 787, 802 [1958], and cases cited therein." *Ibid.*

This passage appears to announce the principle that in considering petitions for inclusion in proposed purchases or mergers under § 5 (2), with accompanying trackage rights, the dominant policy is preservation of the market shares of the railroads already serving the location in question, so long as those railroads provide reasonably adequate switching service to other carriers in the area. Whatever doubts we might have, either as to the principle itself or its application to this case, are removed by the critical paragraph that immediately follows the sentences just quoted:

> "As shown in the appendix, SP shared, through connections and use of joint rates and routes, in only about 20 percent of Peninsula's traffic during 1966, and only about 17 percent during 1967. Milwaukee's share, also via connections and joint rates and routes, amounted to only 1 percent during those years. Permitting SP and Milwaukee to acquire access to, and equal ownership of, Peninsula and

> therefore participate in its existing traffic on a direct haul basis will, of course, allow those two railroads to increase their share of Peninsula's declining traffic (3,640 loaded cars handled in 1966 and 2,748 handled in 1967). These increased shares of SP and Milwaukee could only be at the expense of the joint applicants and the railway employees whose jobs would be eliminated by the direct service planned by SP and Milwaukee." *Ibid.*

This discussion strikes us as initially misdirected because it ignores the prospective presence of Milwaukee in this area. In 1966 and 1967, Milwaukee trains were still running no closer to Portland than Longview, Washington, 46 miles away. All through the Commission proceedings, however, it was assumed by all concerned that pursuant to Condition 24 (a) of the Northern Lines merger, Milwaukee would soon be operating directly into Portland over Burlington Northern tracks, as it is today. Granted that Milwaukee had only 1% of Peninsula's traffic in 1966 and 1967, the Commission pointed to no evidence that the Milwaukee share would continue to be this small after affirmance of the Northern Lines merger.

The next difficulty with the Commission's approach relates to the potential growth of Peninsula traffic. The *raison d'être* of this litigation has been the possibility that Peninsula would become the northern access to Rivergate. As we have already noted, this possibility may be remote, given the physical limitations of Peninsula's present facilities. But the Commission nowhere states that the possibility is too speculative to be considered in this litigation. The paragraph we have just quoted, then, reads strangely indeed; for *if* Peninsula becomes the northern route into Rivergate, the estimates we have been given indicate that daily traffic over its line would increase from the 1967 rate of 30 cars per day to over 300 cars per day, assuming that a roughly equal number

of cars go out over each of the northern and southern routes from Rivergate. Yet according to the principle announced by the Commission, the public interest requires that Burlington Northern's and UP's 80% share of this potentially enormous traffic be protected.

Such an approach seems to us to fly in the face of the well-settled principle that the Commission is obligated to consider the anticompetitive effects of any § 5 (2) transaction. *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 83–87 (1944); *Northern Lines Merger Cases,* 396 U. S. 491, 511–516 (1970). It is not necessary to invoke the precise terms of Condition 24 (a) and decide their applicability to this case, to take cognizance of the fact that prior to the Northern Lines merger, Milwaukee was a weak carrier in the Northern Tier of States. *Northern Lines Merger Cases,* 396 U. S., at 504, 514–516. Condition 24 (a) was not intended to foreclose consideration of Milwaukee's competitive position *vis-à-vis* Burlington Northern in any other proceeding. Both Milwaukee and SP were entitled to explicit consideration of their economic positions as compared with that of Burlington Northern and UP or, at least, a clear statement why such an inquiry was not appropriate.

Even the one case cited by the Commission in support of its general principle, *Minneapolis, St. P. & S. S. M. R. Co. Acquisition,* 295 I. C. C. 787, 802 (1958), undercuts the Commission's reasoning. There, the Commission denied applications of other lines for permission to acquire tracks and to undertake new construction in territory traditionally served by the Chicago & North Western Railway Co.; the latter's economic vulnerability made preservation of its exclusive territory important to the public interest.

There is no indication in the present case that Burlington Northern and UP are economically vulnerable, or that they in any way need their present share of Penin-

sula traffic to serve the public interest. We are confronted with two railroads that already control one actual route into Rivergate (via Barnes Yard) and one potential route (any spur leading off the Burlington Northern-SP&S main-line tracks), and that now seek to acquire, for themselves alone, the one remaining route. The Commission's entire discussion of the anticompetitive aspects of this acquisition can be summed up as follows: to the extent that SP and Milwaukee may gain by four-railroad ownership of Peninsula, Burlington Northern and UP will lose; *therefore* the petitions for inclusion are denied. We do not approve this approach to the case.

Despite what we have said about the Commission's apparent reasoning, it does not necessarily follow that the result it reached was incorrect. Given the uncertainty about the northern access to Rivergate, and given the apparent fact that physical operation over Peninsula and into Rivergate was not at issue, approval of the purchase by Burlington Northern and UP alone, with the eight attached conditions, may be the result most in the public interest at the present time. We note that the Commission retained jurisdiction over the proceedings.

But it is not the role of this Court to arrive at its own determination of the public interest on the facts of this case. Our appellate function in administrative cases is limited to considering whether the announced grounds for the agency decision comport with the applicable legal principles. *SEC* v. *Chenery Corp.*, 318 U. S. 80, 87–88 (1943). In this proceeding—where the record is already confused by ambiguities over what was thought to be at issue—we cannot say that the grounds for the agency decision are consistent with the "public interest" standard found in the Interstate Commerce Act. We must reverse and remand for further proceedings.

C. Southern Pacific's § 3 (5) Applications

We turn to SP's applications for trackage rights which would permit it to run trains directly to Peninsula from East Portland. According to the Commission:

> "The intent of Congress in enacting section 3 (5) was to provide a method of avoiding the necessity for incurring unnecessary expense in duplicating existing terminal facilities by a railroad entitled to serve a particular territory." 334 I. C. C., at 435.

Since SP was "not entitled to serve Peninsula or Rivergate," it went on,

> "we need not reach the questions of whether common use of the facilities involved would be practicable or would substantially impair the ability of Peninsula and UP to handle their own business." *Id.*, at 436.

According to the rule applied here, if a railroad is not "entitled to serve" a particular territory, the Commission conclusively presumes that granting § 3 (5) rights would not be in the "public interest." Whether or not such a *per se* rule is permissible under § 3 (5) strikes us as a substantial question of statutory construction. For the following reasons, however, we decline to decide this question in the instant case and include these § 3 (5) proceedings in our remand to the Commission.

First, we note that the two cases cited by the Commission in support of its announced rule, *Use of Northern Pacific Tracks at Seattle by Great Northern*, 161 I. C. C. 699 (1930), and *Seaboard Air Line R. Co.—Use of Terminal Facilities of Florida East Coast R. Co.*, 327 I. C. C. 1 (1965), do not directly present the question at issue, since in each case the Commission decided that the applying railroad was entitled to serve the area and went on to grant the requested trackage rights.

Second, we note that the Commission's brief now defends the ruling below on broader grounds than those that were announced. This leads us to doubt the extent to which the Commission's announced rule is settled ICC law.

Third, the question of § 3 (5) relief may become moot if the Commission, on remand of the § 5 (2) petitions for inclusion, reverses itself and requires trackage rights for SP as a condition for approval of the purchase of Peninsula, and if the purchase is then consummated.

Fourth, the § 3 (5) applications were considered in close connection with the § 5 (2) petitions for inclusion by both the Commission and the hearing examiner. We cannot say with assurance that the Commission would approach the § 3 (5) applications in the same way after reconsidering the petitions for inclusion in light of Parts II (A) and (B) of this opinion.

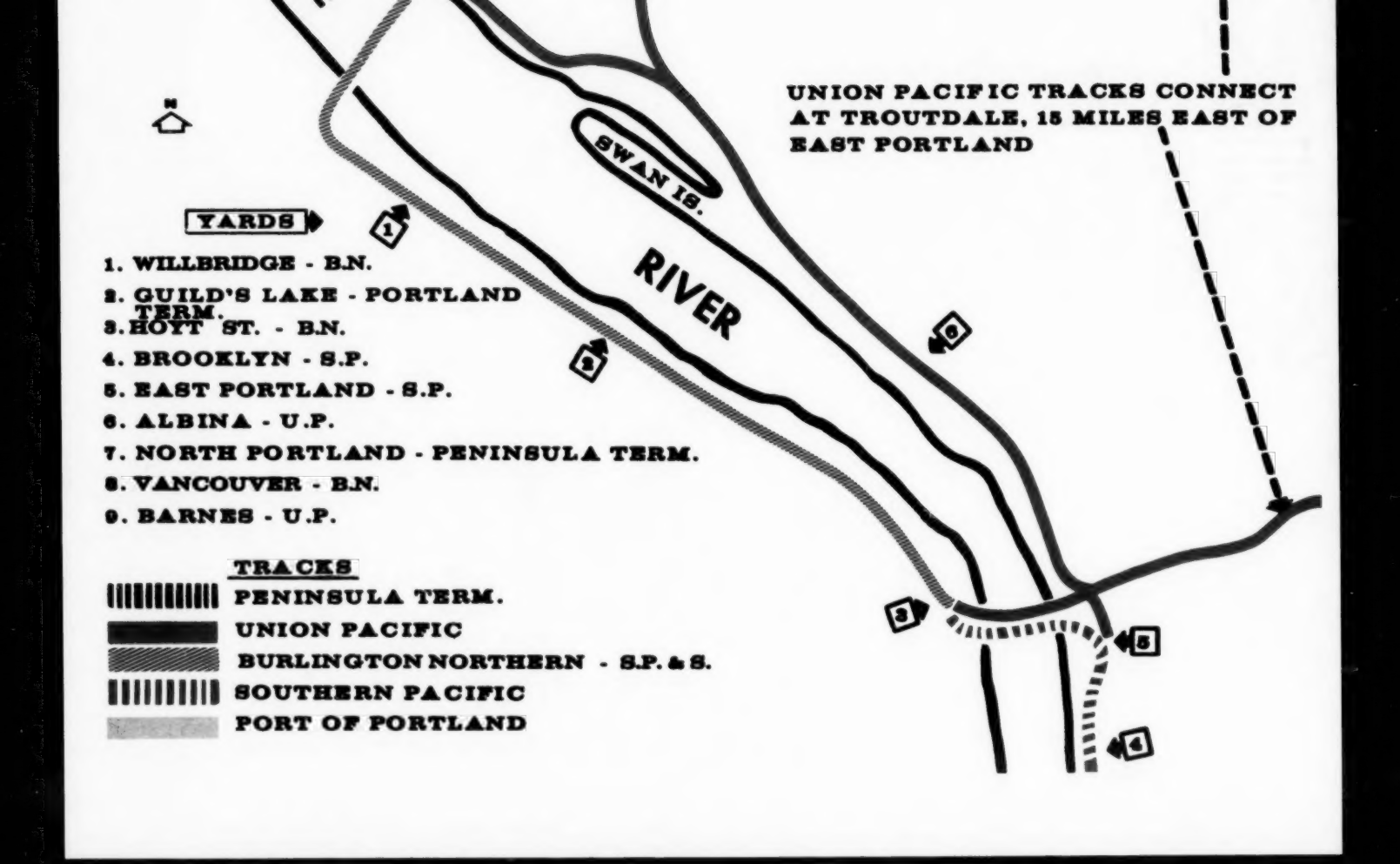
The judgment of the District Court is reversed. The case is remanded to the District Court with instructions that it remand to the Interstate Commerce Commission for further proceedings consistent with this opinion.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

[Schematic map follows this page.]

INDUSTRY
A OREGON STEEL MILL
B COLLIER CARBON & CHEMICAL CORP.
C ASH GROVE CEMENT CO.
D CROWN ZELLERBACH WATERWAY TERM.
E CROWN ZELLERBACH POLE YARD
VANCOUVER WN
8
HAYDEN ISLAND
RIVERGATE
A
B
C
D
E
COLUMBIA RIVER
7
9

COLUMBIA RIVER
PORTLAND
WILLAMETTE
7
9


UNION PACIFIC TRACKS CONNECT AT TROUTDALE, 15 MILES EAST OF EAST PORTLAND
SWAN IS.
RIVER
YARDS
1. WILLBRIDGE - B.N.
2. GUILD'S LAKE - PORTLAND TERM.
3. HOYT ST. - B.N.
4. BROOKLYN - S.P.
5. EAST PORTLAND - S.P.
6. ALBINA - U.P.
7. NORTH PORTLAND - PENINSULA TERM.
8. VANCOUVER - B.N.
9. BARNES - U.P.
TRACKS
PENINSULA TERM.
UNION PACIFIC
BURLINGTON NORTHERN - S.P. & S.
SOUTHERN PACIFIC
PORT OF PORTLAND

STEWART *v.* MASSACHUSETTS

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 71–5446. Decided June 29, 1972

Imposition and carrying out of death penalty in this case *held* to constitute cruel and unusual punishment in violation of Eighth and Fourteenth Amendments. *Furman* v. *Georgia, ante,* p. 238. — Mass. —, 270 N. E. 2d 811, vacated and remanded.

PER CURIAM.

The appellant in this case was sentenced to death. The imposition and carrying out of that death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Furman* v. *Georgia, ante,* p. 238. The motion for leave to proceed *in forma pauperis* is granted. The judgment is therefore vacated insofar as it leaves undisturbed the death penalty imposed, and the case is remanded for further proceedings.

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 845 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS OF JUNE 26 THROUGH JUNE 29, 1972

JUNE 26, 1972

Affirmed on Appeal

No. 70–143. SHAMES ET AL. *v.* NEBRASKA ET AL. Appeal from D. C. Neb. Judgment affirmed. MR. JUSTICE DOUGLAS would note probable jurisdiction. Reported below: 323 F. Supp. 1321.

Appeals Dismissed

No. 71–1063. CAREY *v.* ELROD ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction. Reported below: 49 Ill. 2d 464, 275 N. E. 2d 367.

No. 71–1093. WESTENT, INC. *v.* DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA ET AL. Appeal from Ct. App. Cal., 1st App. Dist. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction.

No. 71–5302. CAULK ET UX. *v.* NICHOLS, JUDGE. Appeal from Sup. Ct. Del. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction. Reported below: —— Del. ——, 281 A. 2d 24.

Vacated and Remanded on Appeal

No. 71–1044. ROSENFELD *v.* NEW JERSEY. Appeal from Super. Ct. N. J. Judgment vacated and case remanded for reconsideration in light of *Cohen* v. *Cali-*

fornia, 403 U. S. 15 (1971), and *Gooding* v. *Wilson*, 405 U. S. 518 (1972). Reported below: See 59 N. J. 435, 283 A. 2d 535.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join, dissenting.*

I am constrained to express my profound disagreement with what the Court does in these three cases on the basis of *Gooding* v. *Wilson*, 405 U. S. 518 (1972).

The important underlying aspect of these cases goes really to the function of law in preserving ordered liberty. Civilized people refrain from "taking the law into their own hands" because of a belief that the government, as their agent, will take care of the problem in an organized, orderly way with as nearly a uniform response as human skills can manage. History is replete with evidence of what happens when the law cannot or does not provide a collective response for conduct so widely regarded as impermissible and intolerable.

It is barely a century since men in parts of this country carried guns constantly because the law did not afford protection. In that setting, the words used in these cases, if directed toward such an armed civilian, could well have led to death or serious bodily injury. When we undermine the general belief that the law will give protection against fighting words and profane and abusive language such as the utterances involved in these cases, we take steps to return to the law of the jungle. These three cases, like *Gooding*, are small but symptomatic steps. If continued, this permissiveness will tend further to erode public confidence in the law—that subtle but indispensable ingredient of ordered liberty.

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*[This opinion applies also to No. 70-5323, *Lewis* v. *City of New Orleans*, *post*, p. 913, and No. 71-6535, *Brown* v. *Oklahoma*, *post*, p. 914.]

In Rosenfeld's case, for example, civilized people attending such a meeting with wives and children would not likely have an instantaneous, violent response, but it does not unduly tax the imagination to think that some justifiably outraged parent whose family were exposed to the foul mouthings of the speaker would "meet him outside" and, either alone or with others, resort to the 19th century's vigorous modes of dealing with such people. I cannot see these holdings as an "advance" in human liberty but rather a retrogression to what men have struggled to escape for a long time.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

It has long been established that the First and Fourteenth Amendments prohibit the States from punishing all but the most "narrowly limited classes of speech." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571 (1942). The right of free speech, however, has never been held to be absolute at all times and under all circumstances. To so hold would sanction invasion of cherished personal rights and would deny the States the power to deal with threats to public order. As the Court noted in *Chaplinsky*:

> "[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are

> of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' *Cantwell* v. *Connecticut*, 310 U. S. 296, 309–310." 315 U. S., at 571–572. (Footnotes omitted.)

This case presents an example of gross abuse of the respected privilege in this country of allowing every citizen to speak his mind. Appellant addressed a public school board meeting attended by about 150 people, approximately 40 of whom were children and 25 of whom were women. In the course of his remarks he used the adjective "m----- f------" on four occasions, to describe the teachers, the school board, the town, and his own country.

For using this language under these circumstances, appellant was prosecuted and convicted under a New Jersey statute which provides:

> "Any person who utters loud and offensive or profane or indecent language in any public street or other public place, public conveyance, or place to which the public is invited . . . [i]s a disorderly person." N. J. Rev. Stat. § 2A:170–29 (1) (1971).

Prior to appellant's prosecution, the Supreme Court of New Jersey had limited the statute's coverage as follows:

> "[T]he words must be spoken loudly, in a public place and must be of such a nature as to be likely to incite the hearer to an immediate breach of the peace or to be likely, in the light of the gender and age of the listener and the setting of the utterance, to affect the sensibilities of a hearer. The words

> must be spoken with the intent to have the above effect or with a reckless disregard of the probability of the above consequences." *State* v. *Profaci*, 56 N. J. 346, 353, 266 A. 2d 579, 583–584 (1970).

The Court today decides to vacate and remand this case for reconsideration in light of *Gooding* v. *Wilson*, 405 U. S. 518 (1972), and *Cohen* v. *California*, 403 U. S. 15 (1971). As it seems to me that neither of these cases is directly relevant, and that considerations not present in those cases are here controlling, I respectfully dissent.

Perhaps appellant's language did not constitute "fighting words" within the meaning of *Chaplinsky*. While most of those attending the school board meeting were undoubtedly outraged and offended, the good taste and restraint of such an audience may have made it unlikely that physical violence would result. Moreover, the offensive words were not directed at a specific individual. But the exception to First Amendment protection recognized in *Chaplinsky* is not limited to words whose mere utterance entails a high probability of an outbreak of physical violence. It also extends to the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience.

The Court of Appeals for the District of Columbia Circuit has addressed this issue more explicitly. Judge McGowan, writing for the court *en banc* in *Williams* v. *District of Columbia*, 136 U. S. App. D. C. 56, 419 F. 2d 638 (1969), correctly stated:

> "Apart from punishing profane or obscene words which are spoken in circumstances which create a threat of violence, the state may also have a legitimate interest in stopping one person from 'inflict[ing] injury' [*Chaplinsky* v. *New Hampshire*, 315 U. S., at 572] on others by verbally assaulting them with language which is grossly offensive because of its profane or obscene character. The fact

> that a person may constitutionally indulge his taste for obscenities in private does not mean that he is free to intrude them upon the attentions of others." *Id.*, at 64, 419 F. 2d, at 646.

I agree with this view that a verbal assault on an unwilling audience may be so grossly offensive and emotionally disturbing as to be the proper subject of criminal proscription, whether under a statute denominating it disorderly conduct, or, more accurately, a public nuisance. Judge McGowan further noted in *Williams:*

> "[A] breach of the peace is threatened either because the language creates a substantial risk of provoking violence, or because it is, under 'contemporary community standards,' so grossly offensive to members of the public who actually overhear it as to amount to a nuisance." *Ibid.* (Footnotes omitted.)

The Model Penal Code, proposed by the American Law Institute, also recognizes a distinction between utterances which may threaten physical violence and those which may amount to a public nuisance, recognizing that neither category falls within the protection of the First Amendment. See Model Penal Code §§ 250.2 (1)(a) and (b). (Proposed Official Draft 1962.)

The decision in *Gooding* v. *Wilson, supra,* turned largely on an application of the First Amendment overbreadth doctrine,[1] and the Court's remand order sug-

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[1] Insofar as the Court's decision in *Gooding* turns on vagueness principles, it seems inapplicable to this case. The essence of the due process vagueness concern is that no man shall be punished for violating a statute which is not "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . . ." *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926). Although the New Jersey statute

gests that the overbreadth doctrine should be applied in this case. The consequences and the unusual character of the overbreadth doctrine have been accurately summarized in Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 852 (1970):

> "[The overbreadth doctrine] results often in the wholesale invalidation of the legislature's handiwork, creating a judicial-legislative confrontation.
>
> "In the end, this departure from the normal method of judging the constitutionality of statutes must find justification in the favored status of rights to expression and association in the constitutional scheme." (Footnotes omitted.)

Because a "judicial-legislative confrontation" often results from application of the overbreadth doctrine, and because it is a departure from the normal method of judicial review,[2] it should be applied with restraint. In my view, the doctrine is not applicable in this case.

The New Jersey statute was designed to prohibit the public use of language such as that involved in this case, and certainly the State has an interest—perhaps a compelling one—in protecting nonassenting citizens from vulgar and offensive verbal assaults. A statute directed narrowly to this interest does not impinge upon the values of protected free speech. Legitimate First Amendment interests are not furthered by stretching the overbreadth doctrine to cover a case of this kind. In *Cohen* v. *California,* 403 U. S. 15 (1971), which deals

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involved in this case is hardly a model of clarity, it cannot reasonably be said that appellant could have been unaware that the language used under the circumstances was proscribed by the statute. Unless he was a person of infirm mentality, appellant certainly knew that his deliberate use four times of what Mr. Justice Harlan termed in *Cohen* a "scurrilous epithet," in the presence of a captive audience including women and children, violated the statute.

[2] See, *e. g., United States* v. *Raines,* 362 U. S. 17, 20–22 (1960)

with the question of what expressive activity is constitutionally punishable, Mr. Justice Harlan described the purpose of the free speech guarantee as follows:

> "It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. See *Whitney* v. *California*, 274 U. S. 357, 375–377 (1927) (Brandeis, J., concurring)." *Id.*, at 24.

The purpose of the overbreadth doctrine is to excise statutes which have a deterrent effect on the exercise of protected speech.[3] It is difficult to believe that sustaining appellant's conviction under this statute will deter others from the exercise of legitimate First Amendment rights.[4]

The line between such rights and the type of conduct proscribed by the New Jersey statute is difficult to draw.

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[3] See Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 853 (1970).

[4] Nor does the continued existence of the New Jersey statute, which must now be construed and applied by the New Jersey courts in light of *Gooding*, have the effect of deterring others in the exercise of their First Amendment rights. To remand this case with the suggestion that the overbreadth doctrine be applied accomplishes only one result: it creates the potential that appellant will receive an undeserved windfall.

I recognize, of course, that serious definitional and enforcement problems are likely to arise even where the statutes in this area are carefully drawn. Yet the inherent difficulty of the problem is not sufficient reason for legislatures and the courts to abdicate their responsibility to protect nonassenting citizens from verbal conduct which is so grossly offensive as to amount to a nuisance.

The preservation of the right to free and robust speech is accorded high priority in our society and under the Constitution. Yet, there are other significant values. One of the hallmarks of a civilized society is the level and quality of discourse. We have witnessed in recent years a disquieting deterioration in standards of taste and civility in speech. For the increasing number of persons who derive satisfaction from vocabularies dependent upon filth and obscenities, there are abundant opportunities to gratify their debased tastes. But our free society must be flexible enough to tolerate even such a debasement provided it occurs without subjecting unwilling audiences to the type of verbal nuisance committed in this case. The shock and sense of affront, and sometimes the injury to mind and spirit, can be as great from words as from some physical attacks.

I conclude in this case that appellant's utterances fall within the proscription of the New Jersey statute, and are not protected by the First Amendment. Accordingly, I would dismiss the appeal for want of a substantial federal question.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.*

In *Lewis*, the police were engaged in making an arrest of appellant's son on grounds not challenged here. While the police were engaged in the performance of their duty, appellant intervened and ultimately addressed the police officers as "g-- d-- m----- f----- police." At that point she herself was arrested for violation of a city ordinance providing:

> "It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to

*[This opinion applies also to No. 70–5323, *Lewis* v. *City of New Orleans*, *post*, p. 913, and No. 71–6535, *Brown* v. *Oklahoma*, *post*, p. 914.]

use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty." § 49–7, Code of City of New Orleans.

In *Rosenfeld,* appellant appeared and spoke at a public school board meeting that was held in an auditorium and was attended by more than 150 men, women, and children of mixed ethnic and racial backgrounds. It was estimated that there were approximately 40 children and 25 women present at the meeting. During his speech, appellant used the adjective "m----- f-----" on four different occasions while concluding his remarks. Testimony varied as to what particular nouns were joined with this adjective, but they were said to include teachers, the community, the school system, the school board, the country, the county, and the town.

Rosenfeld was convicted under a New Jersey statute that provides:

> "Any person who utters loud and offensive or profane or indecent language in any public street or other public place, public conveyance, or place to which the public is invited . . . [i]s a disorderly person." N. J. Rev. Stat. § 2A:170–29 (1) (1971).

The New Jersey Supreme Court, prior to the instant case, had placed the following limiting construction on the New Jersey statute:

> "[T]he words must be spoken loudly, in a public place and must be of such a nature as to be likely to incite the hearer to an immediate breach of the peace or to be likely, in the light of the gender and age of the listener and the setting of the utterance, to affect the sensibilities of a hearer. The words must be spoken with the intent to have the above effect or with a reckless disregard of the probability of the above consequences." *State* v.

Profaci, 56 N. J. 346, 353, 266 A. 2d 579, 583–584 (1970).

Appellant in *Brown* spoke to a large group of men and women gathered in the University of Tulsa chapel. During a question and answer period he referred to some policemen as "m----- f----- fascist pig cops" and to a particular Tulsa police officer as that "black m----- f----- pig . . . ." Brown was convicted of violating an Oklahoma statute that prohibited the utterance of "any obscene or lascivious language or word in any public place, or in the presence of females . . . ." Okla. Stat. Ann., Tit. 21, § 906 (1958).

The Court vacates and remands these cases for reconsideration in the light of *Gooding* v. *Wilson*, 405 U. S. 518 (1972), and *Cohen* v. *California*, 403 U. S. 15 (1971) (the latter decided some four months before the opinion of the New Jersey Superior Court, Appellate Division, which upheld Rosenfeld's conviction, and six months before that of the Oklahoma Court of Criminal Appeals in *Brown*).

Insofar as the Court's remand is based on *Cohen*, *supra*, for the reasons stated in MR. JUSTICE BLACKMUN's dissenting opinion in that case, *id.*, at 27, I would not deny to these States the power to punish language of the sort used here by appropriate legislation. Appellant Lewis' words to the police officers were "fighting words," and those of appellants Rosenfeld and Brown were "lewd and obscene" and "profane" as those terms are used in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), the leading case in the field. Delineating the type of language that the States may constitutionally punish, the Court there said:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise

> any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' *Cantwell* v. *Connecticut*, 310 U. S. 296, 309–310." 315 U. S., at 571–572.

The language used by these appellants therefore clearly falls within the class of punishable utterances described in *Chaplinsky*.

Gooding v. *Wilson*, *supra*, dealt both with the type of speech that the States could constitutionally punish, and the doctrine of First Amendment overbreadth. With respect to the latter, the Court said:

> "The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within 'narrowly limited classes of speech.' *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571 (1942). Even as to such a class, however, because 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn,' *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958), '[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom,' *Cant-*

> *well* v. *Connecticut*, 310 U. S. 296, 304 (1940). In other words, the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression." *Id.*, at 521–522.

Unless we are to distort the doctrine of overbreadth into a verbal game of logic-chopping and sentence-parsing reminiscent of common-law pleading, it cannot fairly be said here that either the New Orleans ordinance, or the New Jersey statute as construed by the highest court of that State, could reasonably be thought "unduly to infringe the protected freedom," *Cantwell* v. *Connecticut*, 310 U. S., at 304.

I would dismiss these appeals for lack of a substantial federal question.

No. 70–5323. LEWIS *v.* CITY OF NEW ORLEANS. Appeal from Sup. Ct. La. Motion for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for reconsideration in light of *Gooding* v. *Wilson*, 405 U. S. 518 (1972).

MR. JUSTICE POWELL, concurring in the result.

Under *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), the issue in a case of this kind is whether "fighting words" were used. Here a police officer, while in the performance of his duty, was called "g-- d--- m------ f-----" police.

If these words had been addressed by one citizen to another, face to face and in a hostile manner, I would have no doubt that they would be "fighting words." But the situation may be different where such words are addressed to a police officer trained to exercise a higher degree of restraint than the average citizen. See Model Penal Code § 250.1, Comments 14 (Tent. Draft No. 13, 1961).

I see no genuine overbreadth problem in this case for the reasons stated in my dissenting opinion in *Rosenfeld* v. *New Jersey, ante,* p. 903.

I would remand for reconsideration only in light of *Chaplinsky.*

[For dissenting opinion of MR. CHIEF JUSTICE BURGER, see *ante,* p. 902.]

[For dissenting opinion of MR. JUSTICE REHNQUIST, see *ante,* p. 909.]

No. 71–6535. BROWN *v.* OKLAHOMA. Appeal from Ct. Crim. App. Okla. Motion for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for reconsideration in light of *Cohen* v. *California,* 403 U. S. 15 (1971), and *Gooding* v. *Wilson,* 405 U. S. 518 (1972). Reported below: 492 P. 2d 1106.

MR. JUSTICE POWELL, concurring in the result.

The statute involved in this case is considerably broader than the statute involved in *Rosenfeld* v. *New Jersey, ante,* p. 901, and it has not been given a narrowing construction by the Oklahoma courts. Moreover, the papers filed in this case indicate that the language for which appellant was prosecuted was used in a political meeting to which appellant had been invited to present the Black Panther viewpoint. In these circumstances language of the character charged might well have been anticipated by the audience.

These factors lead me to conclude that this case is significantly different from *Rosenfeld* v. *New Jersey, supra.* I therefore concur in the Court's disposition of this case.

[For dissenting opinion of MR. CHIEF JUSTICE BURGER, see *ante,* p. 902.]

[For dissenting opinion of MR. JUSTICE REHNQUIST, see *ante,* p. 909.]

Certiorari Granted—Reversed. (See No. 71–5625, *ante*, p. 229; and No. 71–6497, *ante*, p. 234.)

Certiorari Granted—Remanded or Vacated and Remanded.

No. 70–5125. CLARK *v.* BOSLOW, INSTITUTION DIRECTOR. C. A. 4th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *McNeil* v. *Director, Patuxent Institution*, 407 U. S. 245.

No. 70–5336. FARRELL *v.* SCHMIDT, SECRETARY, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, ET AL. Sup. Ct. Wis. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Humphrey* v. *Cady*, 405 U. S. 504.

No. 71–239. FERGUSON, U. S. DISTRICT JUDGE *v.* UNITED STATES. Certiorari before judgment to C. A. 9th Cir. Certiorari granted and case remanded for further consideration in light of *United States* v. *United States District Court for the Eastern District of Michigan (Plamondon et al., Real Parties in Interest)*, 407 U. S. 297.

No. 71–1028. CAMPOPIANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. Judgment vacated and case remanded for further consideration in light of *Barker* v. *Wingo, Warden*, 407 U. S. 514. Reported below: 446 F. 2d 869.

No. 71–5100. BACON *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Gelbard* v. *United States*, and *United States* v. *Egan*, *ante*, p. 41. Reported below: 446 F. 2d 667.

No. 71–847. SAGLIMBENE *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. Judgment vacated and case remanded for further consideration in light of *Barker* v. *Wingo, Warden,* 407 U. S. 514.

No. 71–5040. MCKENZIE *v.* DIRECTOR, PATUXENT INSTITUTION. Ct. Sp. App. Md. Petition for rehearing granted and order of November 22, 1971 [404 U. S. 979], denying petition for writ of certiorari vacated. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *McNeil* v. *Director, Patuxent Institution,* 407 U. S. 245. MR. JUSTICE DOUGLAS would grant certiorari and reverse in light of *McNeil* v. *Director, Patuxent Institution, supra.*

No. 71–5672. OLSEN *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Gelbard* v. *United States,* and *United States* v. *Egan, ante,* p. 41. Reported below: 446 F. 2d 912.

No. 71–6196. KELLEY *v.* KENTUCKY. Ct. App. Ky. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Barker* v. *Wingo, Warden,* 407 U. S. 514. Reported below: 474 S. W. 2d 63.

No. 71–6337. FASANARO *v.* UNITED STATES. C. A. 2d Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Barker* v. *Wingo, Warden,* 407 U. S. 514.

Miscellaneous Orders

No. 35, Orig. UNITED STATES *v.* MAINE ET AL. [Motion for leave to file bill of complaint granted, 395 U. S. 955.] Motion of Commonwealth of Massachusetts for a preliminary injunction denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion.

No. 40, Orig. PENNSYLVANIA *v.* NEW YORK ET AL., 407 U. S. 206. It is ordered that the expenditures of John F. Davis as Special Master in the amount of $626.54 be approved. It is further ordered that the balance of advances made by the parties to meet expenses in the amount of $1,373.46 be retained by the Special Master and applied toward his compensation. It is further ordered that the total compensation for the Special Master be fixed at ten thousand five hundred dollars ($10,500) and that that amount, less the balance of the money advanced for expenses, shall be paid to him by Western Union out of the funds in its possession which are the subject of this suit and that Western Union be given credit for that amount divided pro rata among the parties who would otherwise be entitled to the money under the opinion and decree of this Court.

No. 50, Orig. VERMONT *v.* NEW YORK ET AL. [Motion to file bill of complaint granted, 406 U. S. 186.] It is ordered that Justice R. Ammi Cutter (retired) be, and he is hereby, appointed Special Master to conduct supplemental proceedings in this case. The Special Master shall have authority to fix the time and conditions for filing additional pleadings and to direct subsequent proceedings, and authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The

Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his reports, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master becomes vacant during the recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

No. 54, Orig. UNITED STATES *v.* FLORIDA ET AL. [Motion to file bill of complaint granted, 405 U. S. 984.] Motion to defer consideration denied. Motion of the State of Texas for appointment of a Special Master granted. It is ordered that Honorable Charles L. Powell, Senior Judge of the United States District Court for the Eastern District of Washington, be, and he is hereby, appointed Special Master in this case. The Special Master shall have authority to fix the time and conditions for filing additional pleadings and to direct subsequent proceedings, and authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his reports, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master becomes vacant during the recess of the Court,

THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

No. 70–2. UNITED STATES *v.* 12 200-FT. REELS OF SUPER 8MM. FILM ET AL. (PALADINI, CLAIMANT). Appeal from D. C. C. D. Cal. [Probable jurisdiction noted, 403 U. S. 930];

No. 70–18. ROE ET AL. *v.* WADE, DISTRICT ATTORNEY OF DALLAS COUNTY. Appeal from D. C. N. D. Tex. [Probable jurisdiction postponed, 402 U. S. 941];

No. 70–40. DOE ET AL. *v.* BOLTON, ATTORNEY GENERAL OF GEORGIA, ET AL. Appeal from D. C. N. D. Ga. [Probable jurisdiction postponed, 402 U. S. 941];

No. 70–69. UNITED STATES *v.* ORITO. Appeal from D. C. E. D. Wis. [Probable jurisdiction noted, 404 U. S. 819]; and

No. 70–73. MILLER *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., County of Orange. [Probable jurisdiction noted, 401 U. S. 992.] These cases are restored to the calendar for reargument. MR. JUSTICE DOUGLAS dissents in Nos. 70–18 and 70–40.

No. 70–35. AUSTIN ET AL. *v.* MEYER ET AL. Appeal from D. C. M. D. Fla. Motion of appellees to vacate stay heretofore granted by Mr. Justice Black on August 31, 1970, presented to MR. JUSTICE POWELL, and by him referred to the Court, granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion. Reported below: 319 F. Supp. 457.

No. 71–1398. WARNER, SECRETARY OF THE NAVY *v.* FLEMINGS. C. A. 2d Cir. [Certiorari granted, 407 U. S. 919.] Motion of respondent for appointment of counsel granted. It is ordered that Michael Meltsner, Esquire, of New York, New York, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 71–1447. DAVIDSON, SECRETARY, MARYLAND DEPARTMENT OF EMPLOYMENT AND SOCIAL SERVICES, ET AL. *v.* FRANCIS ET AL.; and

No. 71–1554. UNITED STATES CHAMBER OF COMMERCE *v.* FRANCIS ET AL. Appeals from D. C. Md. The Solicitor General is invited to file a brief in these cases expressing the views of the United States. Reported below: 340 F. Supp. 351.

No. 71–6633. VALDEZ *v.* NELSON, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 71–6620. HEADLEY ET AL. *v.* PALMIERI, U. S. DISTRICT JUDGE; and

No. 71–6645. REED *v.* LAWRENCE, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus denied.

No. 71–1437. WHITCOMB, GOVERNOR OF INDIANA, ET AL. *v.* ESCHBACH, U. S. DISTRICT JUDGE. Motion of Gaither and Roth [plaintiffs in related case] for leave to proceed *in forma pauperis* granted. Motion for leave to file petition for writ of prohibition and/or mandamus denied.

Probable Jurisdiction Noted

No. 71–653. GIBSON ET AL. *v.* BERRYHILL ET AL. Appeal from D. C. M. D. Ala. Probable jurisdiction noted. Reported below: 331 F. Supp. 122.

No. 71–1456. SALYER LAND CO. ET AL. *v.* TULARE LAKE BASIN WATER STORAGE DISTRICT. Appeal from D. C. E. D. Cal. Probable jurisdiction noted. Reported below: 342 F. Supp. 144.

No. 71–575. GOMEZ *v.* PEREZ. Appeal from Ct. Civ. App. Tex., 4th Sup. Jud. Dist. Probable jurisdiction noted and case set for oral argument with No. 71–6078 [*S.* v. *D.*, probable jurisdiction postponed, 405 U. S. 1064]. Reported below: 466 S. W. 2d 41.

Certiorari Granted

No. 71–1422. KAPLAN *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari granted. Reported below: 23 Cal. App. 3d Supp. 9, 100 Cal. Rptr. 372.

No. 71–1051. PARIS ADULT THEATRE I ET AL. *v.* SLATON, DISTRICT ATTORNEY, ATLANTA JUDICIAL CIRCUIT, ET AL. Sup. Ct. Ga. Motion to supplement petition and certiorari granted. Parties requested to brief and argue, in addition to those questions presented in the petition, the following question: "Whether the display of any sexually oriented films in a commercial theatre, when surrounded by notice to the public of their nature and by reasonable protection against exposure of the films to juveniles, is constitutionally protected?" Reported below: 228 Ga. 343, 185 S. E. 2d 768.

No. 71–1225. GAGNON, WARDEN *v.* SCARPELLI. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Motion of respondent for appointment of counsel granted. It is ordered that William M. Coffey, Esquire, of Milwaukee, Wisconsin, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent in this case. Reported below: 454 F. 2d 416.

No. 71–1315. ALEXANDER ET AL. *v.* VIRGINIA. Sup. Ct. Va. Certiorari granted. Parties are requested to brief and argue in addition to those questions presented in the petition the following question: "Whether the display of any sexually oriented pictorial magazines for commercial sale, when surrounded by notice to the public of their nature and by reasonable protection against exposure of the magazines to juveniles, is constitutionally protected?" Reported below: 212 Va. 554, 186 S. E. 2d 43.

No. 71–6193. BROWN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 452 F. 2d 868.

No. 71–6356. DOE ET AL. *v.* MCMILLAN ET AL. C. A. D. C. Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 148 U. S. App. D. C. 280, 459 F. 2d 1304.

No. 71–6316. GOOSBY ET AL. *v.* OSSER ET AL. C. A. 3d Cir. Motion of American Jewish Committee (National) et al. for leave to file a brief as *amici curiae* granted. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 452 F. 2d 39.

Certiorari Denied

No. 71–379. REED *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 448 F. 2d 1276.

No. 71–405. EGAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 450 F. 2d 199.

No. 71–1058. BECKMAN *v.* WALTER KIDDE & CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 451 F. 2d 593.

No. 71–1121. PETREE *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 124 Ga. App. 670, 185 S. E. 2d 562.

No. 71–1123. RAFFERTY ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied. Reported below: 452 F. 2d 767.

No. 71–1214. STEIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 456 F. 2d 844.

No. 71–1313. HAM ET AL. *v.* ROMNEY, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 455 F. 2d 607.

No. 71–1316. CRENSHAW, EXECUTOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 472.

No. 71–1327. SCHWARTZ ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–1329. WARZYNIAK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 71–1330. KATZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 455 F. 2d 496.

No. 71–1333. WOLFE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 457 F. 2d 773.

No. 71–1343. ROSSI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 453 F. 2d 752.

No. 71–1349. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 456 F. 2d 569.

No. 71–1351. BRENNEMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 455 F. 2d 809.

No. 71–1409. UNITED STATES STEEL CORP. ET AL. *v.* UNITED MINE WORKERS OF AMERICA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 456 F. 2d 483.

No. 71–1421. BELL *v.* TAYLOR, EXECUTOR. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 21 Cal. App. 3d 1002, 98 Cal. Rptr. 855.

No. 71–1423. GREENE *v.* REAL ESTATE COMMISSION OF THE DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied.

No. 71–1425. CENTRAL PENN NATIONAL BANK ET AL. *v.* TRUSTEES OF THE PROPERTY OF THE PENN CENTRAL TRANSPORTATION CO. C. A. 3d Cir. Certiorari denied. Reported below: 453 F. 2d 520.

No. 71–1430. SEAMAN, DBA LES'S ROLLER RINK ET AL. *v.* EVANS. C. A. 5th Cir. Certiorari denied. Reported below: 452 F. 2d 749.

No. 71–1443. CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT ET AL. *v.* CROW ET AL. Petition for certiorari before judgment to C. A. 9th Cir. Certiorari denied.

No. 71–1444. BLUM *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 71–1446. HUTTER ET AL. *v.* DOOR COUNTY, WISCONSIN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 71–1449. GOLDEN ET AL. *v.* THE SHEARMAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 455 F. 2d 133.

No. 71–1450. POFF *v.* DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–1454. BRENNAN ET AL. *v.* HAINES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 455 F. 2d 943.

No. 71–1461. CADOUX *v.* PLANNING AND ZONING COMMISSION OF THE TOWN OF WESTON. Sup. Ct. Conn. Certiorari denied. Reported below: 162 Conn. 425, 294 A. 2d 582.

No. 71–1550. MCFERRIN *v.* LUBBOCK NATIONAL BANK. C. A. 5th Cir. Certiorari denied. Reported below: 455 F. 2d 991.

No. 71–5737. REYNOLDS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 449 F. 2d 1347.

No. 71–5881. MOLTER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 71–1541. SUSQUEHANNA CORP. *v.* DASHO, EXECUTRIX, ET AL.;

No. 71–1542. BOGAN ET AL. *v.* DASHO, EXECUTRIX, ET AL.; and

No. 71–1543. HARDIN ET AL. *v.* DASHO, EXECUTRIX, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 461 F. 2d 11.

No. 71–6189. CANNON *v.* MISSOURI. C. A. 8th Cir. Certiorari denied.

No. 71–6232. BROWN *v.* CLARK, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 71–6241. SIIRILA *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 292 Minn. 1, 193 N. W. 2d 467.

No. 71–6247. NICKERSON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: See 13 N. C. App. 125, 185 S. E. 2d 326.

No. 71–6262. NICKOLS *v.* GAGNON. C. A. 7th Cir. Certiorari denied. Reported below: 454 F. 2d 467.

No. 71–6295. SIMPSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 453 F. 2d 1028.

No. 71–6299. CANCINO *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 196 Ct. Cl. 568, 451 F. 2d 1028.

No. 71–6302. SANDERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 71–6342. WALTON *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied.

No. 71–6433. SANDERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71-6491. BURNETTE *v.* UNITED STATES;

No. 71-6501. GRAY *v.* UNITED STATES; and

No. 71-6505. WILKERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 456 F. 2d 57.

No. 71-6492. GUTIERREZ-RUBIO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 1243.

No. 71-6504. ZURITA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 71-6507. WALLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 456 F. 2d 132.

No. 71-6513. LANDMAN *v.* CLARK, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 456 F. 2d 215.

No. 71-6525. SPENCER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 456 F. 2d 1202.

No. 71-6527. DURHAM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 71-6574. MCGUCKEN *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 197 Ct. Cl. 965.

No. 71-6601. ALLEN *v.* WORRALL. C. A. 4th Cir. Certiorari denied.

No. 71-6604. BOAG *v.* BOIES, SHERIFF, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 455 F. 2d 467.

No. 71-6607. INGRAM *v.* ARKANSAS. C. A. 8th Cir. Certiorari denied.

No. 71-6609. SZWALLA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 71–6613. HAYES *v.* COULON ET AL. C. A. 6th Cir. Certiorari denied.

No. 71–6621. NIXON *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 456 F. 2d 1065.

No. 71–6622. KEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 458 F. 2d 1189.

No. 71–6623. MORNINGSTAR *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Riverside. Certiorari denied.

No. 71–6626. LOGAN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 71–6630. PILLIS ET AL. *v.* STATE BOARD OF ELECTIONS ET AL. C. A. 4th Cir. Certiorari denied.

No. 71–6632. HAMILTON *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 71–6635. JONES *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 244 Ind. 682, 195 N. E. 2d 460.

No. 71–6636. HARDIN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 475 S. W. 2d 254.

No. 71–6638. THORNHILL *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 71–6642. LARY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 475 S. W. 2d 248.

No. 71–6652. ROTH *v.* ZELKER, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 455 F. 2d 1105.

No. 71–6655. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–6661. MILES *v.* GRAHAM. C. A. 4th Cir. Certiorari denied.

No. 71–6721. SWINTON *v.* ROSE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 70–5035. DICKERSON *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 430 F. 2d 462.

No. 70–5077. BRUMFIELD *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 436 F. 2d 1080.

No. 71–1344. DETORE, AKA HAYES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–1383. POOLEY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 257 So. 2d 212.

No. 71–1427. WILSON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 278 Ind. 569, 278 N. E. 2d 569.

No. 71–1433. BELLISTON ET AL. *v.* TEXACO INC. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 455 F. 2d 175.

No. 71–1475. WILSON *v.* DEITZ, COMMISSIONER, DEPARTMENT OF ECONOMIC SECURITY, DIVISION OF PUBLIC ASSISTANCE, OF KENTUCKY. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 456 F. 2d 314.

No. 71–1503. DeSoto, Inc. *v.* Cataphote Corp. et al. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Reported below: 450 F. 2d 769.

No. 71–1513. Russo *v.* Byrne, U. S. District Judge. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted.

No. 71–5121. Baker *v.* Tollett, Warden. C. A. 6th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted.

No. 71–6210. Ansley *v.* Georgia. Ct. App. Ga. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Reported below: 124 Ga. App. 670, 185 S. E. 2d 562.

No. 71–6340. Robinson *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Reported below: 256 So. 2d 29.

No. 71–6350. Lewis *v.* Michigan. Sup. Ct. Mich. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Reported below: 386 Mich. 407, 192 N. W. 2d 215.

No. 71–6596. Evans *v.* Swenson, Warden. C. A. 8th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Reported below: 455 F. 2d 291.

No. 71–6618. Bogdan *v.* Rodriguez, Warden. C. A. 10th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted.

No. 71–6628. Goetz *v.* Oregon. Sup. Ct. Ore. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Reported below: See 7 Ore. App. 515, 491 P. 2d 220.

No. 71–256. UNITED STATES *v.* EVANS ET AL. C. A. D. C. Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 146 U. S. App. D. C. 310, 452 F. 2d 1239.

No. 71–1340. NEW YORK DISTRICT COUNCIL No. 9, INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. Reported below: 453 F. 2d 783.

No. 71–1411. LII *v.* SIDA OF HAWAII, INC., ET AL. Sup. Ct. Haw. Motions to dispense with printing petition and brief in opposition granted. Certiorari denied. Reported below: 53 Haw. 353, 493 P. 2d 1032.

No. 71–1426. CHAMBERS *v.* SPEIGHT, COMMISSIONER OF HIGHWAYS AND PUBLIC WORKS OF TENNESSEE. C. A. 6th Cir. Motion to dispense with printing petition granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–1431. TRIANGLE PUBLICATIONS, INC., ET AL. *v.* MATUS. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 445 Pa. 384, 286 A. 2d 357.

No. 71–1441. CONNORS ET AL. *v.* CHAS. PFIZER & CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 450 F. 2d 1119.

No. 71–1534. MONTANA POWER CO. *v.* FEDERAL POWER COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 148 U. S. App. D. C. 74, 459 F. 2d 863.

No. 71–1549. BLANKNER *v.* CITY OF CHICAGO. Sup. Ct. Ill. Motions of Janitors Union Local 1, Chicago Property Owners Assn. et al., and Roman C. Pucinski for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 50 Ill. 2d 69, 277 N. E. 2d 129.

No. 71–1581. FERRARA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 458 F. 2d 868.

No. 71–6468. HURST *v.* ESTES, U. S. DISTRICT JUDGE; and

No. 71–6790. HURST *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner to consolidate granted. Certiorari denied. Reported below: 460 F. 2d 1258.

No. 71–6625. HOLT *v.* CITY OF RICHMOND ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 459 F. 2d 1093.

Rehearing Granted. (See No. 71–5040, *supra.*)

Rehearing Denied

No. 70–78. AFFILIATED UTE CITIZENS OF UTAH ET AL. *v.* UNITED STATES ET AL., 406 U. S. 128. Petition for rehearing denied. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition.

No. 70–117. KASTIGAR ET AL. *v.* UNITED STATES, 406 U. S. 441. Petition for rehearing denied. MR. JUSTICE BRENNAN and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition.

No. 71–5830. JONES *v.* CRAVEN, WARDEN, 406 U. S. 921. Motion for leave to file petition for rehearing denied.

No. 71–913. SEABOARD SHIPPING CORP. *v.* MORAN INLAND WATERWAYS CORP. ET AL., 406 U. S. 949;

No. 71–1068. MIDWEST FREIGHT FORWARDING CO., INC., ET AL. *v.* LEWIS, SECRETARY OF STATE OF ILLINOIS, ET AL., 406 U. S. 939;

No. 71–1264. FERRELL ET AL. *v.* HALL, GOVERNOR OF OKLAHOMA, ET AL., 406 U. S. 939;

No. 71–5795. PARK *v.* CALIFORNIA ET AL., 406 U. S. 962;

No. 71–6170. SOOTS ET UX. *v.* PANARO, 406 U. S. 922;

No. 71–6194. BATEN *v.* DISTRICT UNEMPLOYMENT COMPENSATION BOARD, 406 U. S. 923;

No. 71–6205. POKRAS *v.* UNITED STATES, 406 U. S. 924;

No. 71–6249. KRIKMANIS *v.* MANNERING ET AL., 406 U. S. 926;

No. 71–6324. DELEVAY *v.* GREYHOUND CORP., 406 U. S. 928; and

No. 71–6429. MAGRO *v.* LENTINI BROS. MOVING & STORAGE CO. ET AL, 406 U. S. 961. Petitions for rehearing denied.

JUNE 29, 1972

Vacated and Remanded on Appeal

No. 68–5017. JOHNSON ET AL. *v.* LOUISIANA. Appeal from Sup. Ct. La. Motion for leave to proceed *in forma pauperis* granted. Judgment vacated insofar as it leaves undisturbed the death penalty imposed, and case remanded for further proceedings. See *Stewart* v. *Massachusetts, ante,* p. 845. Reported below: 253 La. 18, 215 So. 2d 838.

No. 69–5050. KERRIGAN *v.* SCAFATI, CORRECTIONAL SUPERINTENDENT. Appeal from D. C. Mass. Motion for leave to proceed *in forma pauperis* granted. Judgment vacated insofar as it leaves undisturbed the death penalty imposed, and case remanded for further proceedings. See *Stewart* v. *Massachusetts, ante,* p. 845.

No. 71–5073. POPE *v.* NEBRASKA. Appeal from Sup. Ct. Neb. Motion for leave to proceed *in forma pauperis* granted. Judgment vacated insofar as it leaves undisturbed the death penalty imposed, and case remanded for further proceedings. See *Stewart* v. *Massachusetts*, *ante*, p. 845. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case. Reported below: 186 Neb. 489, 184 N. W. 2d 395.

No. 70–210. OYEN ET AL. *v.* WASHINGTON. Appeal from Sup. Ct. Wash. Motion to dispense with printing jurisdictional statement granted. Judgment vacated and case remanded for further consideration in light of *Police Department of City of Chicago* v. *Mosley*, *ante*, p. 92, and *Grayned* v. *City of Rockford*, *ante*, p. 104. Reported below: 78 Wash. 2d 909, 480 P. 2d 766.

Appeal Dismissed

No. 68–5012. HOWARD *v.* NEVADA. Appeal from Sup. Ct. Nev. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 84 Nev. 599, 446 P. 2d 163.

Certiorari Granted—Vacated and Remanded

In each of the following cases (beginning with No. 68–5001 on this page and extending through No. 71–6592 on p. 940), the motion for leave to proceed *in forma pauperis* and certiorari are granted. The judgment is vacated insofar as it leaves undisturbed the death penalty imposed, and the case is remanded for further proceedings. See *Stewart* v. *Massachusetts*, *ante*, p. 845.

No. 68–5001. MARKS *v.* LOUISIANA. Sup. Ct. La. Reported below: 252 La. 277, 211 So. 2d 261.

No. 68–5002. MCCANTS *v.* ALABAMA. Sup. Ct. Ala. Reported below: 282 Ala. 397, 211 So. 2d 877.

No. 68–5003. In re Reynolds et al. C. A. 3d Cir. Reported below: 397 F. 2d 131.

No. 68–5004. Yates *v.* Cook, Penitentiary Superintendent. C. A. 5th Cir. Reported below: 402 F. 2d 113.

No. 68–5005. Sims *v.* Eyman, Penitentiary Superintendent. C. A. 9th Cir. Reported below: 405 F. 2d 439.

No. 68–5006. Wright *v.* Beto, Corrections Director. Ct. Crim. App. Tex. Reported below: 422 S. W. 2d 184.

No. 68–5008. Miller *v.* Maryland. Ct. App. Md. Reported below: 251 Md. 362, 247 A. 2d 530.

No. 68–5010. Williams *v.* Louisiana. Sup. Ct. La. Reported below: 252 La. 1023, 215 So. 2d 799.

No. 68–5011. Hubbard *v.* Alabama. Sup. Ct. Ala. Reported below: 283 Ala. 183, 215 So. 2d 261.

No. 68–5013. Scoleri *v.* Pennsylvania. Sup. Ct. Pa. Reported below: 432 Pa. 571, 248 A. 2d 295.

No. 68–5015. Janovic *v.* Eyman, Warden. C. A. 9th Cir. Reported below: 406 F. 2d 314.

No. 68–5016. Smith et al. *v.* Washington. Sup. Ct. Wash. Reported below: 74 Wash. 2d 744, 446 P. 2d 571.

No. 68–5018. Billingsley *v.* New Jersey et al. C. A. 3d Cir. Reported below: 408 F. 2d 1181.

No. 68–5019. Morford *v.* Hocker, Warden. Sup. Ct. Nev.

No. 68–5022. Kruchten *v.* Eyman, Warden. C. A. 9th Cir. Reported below: 406 F. 2d 304.

No. 68–5023. Smith *v.* Texas. Ct. Crim. App. Tex. Reported below: 437 S. W. 2d 835.

No. 68–5024. McAllister *v.* Louisiana. Sup. Ct. La. Reported below: 253 La. 382, 218 So. 2d 305.

No. 69–2. Koonce *v.* Oklahoma. Ct. Crim. App. Okla. Reported below: 456 P. 2d 549.

No. 69–3. PARK *v.* GEORGIA. Sup. Ct. Ga. Reported below: 225 Ga. 618, 170 S. E. 2d 687.

No. 69–5004. HURST *v.* ILLINOIS ET AL. Sup. Ct. Ill. Reported below: 42 Ill. 2d 217, 247 N. E. 2d 614.

No. 69–5005. LOKOS *v.* ALABAMA. Sup. Ct. Ala. Reported below: 284 Ala. 53, 221 So. 2d 689.

No. 69–5006. SULLIVAN *v.* GEORGIA. Sup. Ct. Ga. Reported below: 225 Ga. 301, 168 S. E. 2d 133.

No. 69–5007. FESMIRE *v.* OKLAHOMA. Ct. Crim. App. Okla. Reported below: 456 P. 2d 573.

No. 69–5008. DUISEN *v.* MISSOURI. Sup. Ct. Mo. Reported below: 441 S. W. 2d 688.

No. 69–5010. THOMAS *v.* FLORIDA. Sup. Ct. Fla. Reported below: 223 So. 2d 318.

No. 69–5011. WALKER *v.* NEVADA. Sup. Ct. Nev. Reported below: 85 Nev. 337, 455 P. 2d 34.

No. 69–5013. MEFFORD *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Reported below: 413 F. 2d 439.

No. 69–5014. DAVIS *v.* CONNECTICUT. Sup. Ct. Conn. Reported below: 158 Conn. 341, 260 A. 2d 587.

No. 69–5015. MANOR *v.* GEORGIA. Sup. Ct. Ga. Reported below: 225 Ga. 538, 170 S. E. 2d 290.

No. 69–5018. EATON *v.* OHIO. Sup. Ct. Ohio. Reported below: 19 Ohio St. 2d 145, 249 N. E. 2d 897.

No. 69–5023. IRVING *v.* MISSISSIPPI. Sup. Ct. Miss. Reported below: 228 So. 2d 266.

No. 69–5024. PARAMORE *v.* FLORIDA. Sup. Ct. Fla. Reported below: 229 So. 2d 855.

No. 69–5025. KELBACH ET AL. *v.* UTAH. Sup. Ct. Utah. Reported below: 23 Utah 2d 231, 461 P. 2d 297.

No. 69–5027. CUMMINGS *v.* GEORGIA. Sup. Ct. Ga. Reported below: 226 Ga. 46, 172 S. E. 2d 395.

No. 69–5028. WILLIAMS *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. Sup. Ct. Va.

No. 69–5029. EUBANKS *v.* OHIO. Sup. Ct. Ohio.

No. 69–5032. ARKWRIGHT *v.* GEORGIA. Sup. Ct. Ga. Reported below: 226 Ga. 192, 173 S. E. 2d 179.

No. 69–5033. ATKINSON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Reported below: 253 S. C. 531, 172 S. E. 2d 111.

No. 69–5034. CARTER *v.* OHIO. Sup. Ct. Ohio. Reported below: 21 Ohio St. 2d 212, 256 N. E. 2d 714.

No. 69–5036. HUBBARD *v.* ALABAMA. Sup. Ct. Ala. Reported below: 285 Ala. 212, 231 So. 2d 86.

No. 69–5038. KEATON *v.* OHIO. Ct. App. Ohio, Franklin County. Reported below: 19 Ohio App. 2d 254, 250 N. E. 2d 901.

No. 69–5039. LEE, AKA KING *v.* GEORGIA. Sup. Ct. Ga. Reported below: 226 Ga. 162, 173 S. E. 2d 209.

No. 69–5043. HUFFMAN *v.* BETO, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Reported below: 450 S. W. 2d 858.

No. 69–5044. SWAIN *v.* ALABAMA. Sup. Ct. Ala. Reported below: 285 Ala. 292, 231 So. 2d 737.

No. 69–5045. THACKER *v.* GEORGIA. Sup. Ct. Ga. Reported below: 226 Ga. 170, 173 S. E. 2d 186.

No. 69–5047. DULING *v.* OHIO. Sup. Ct. Ohio. Reported below: 21 Ohio St. 2d 13, 254 N. E. 2d 670.

No. 69–5048. LASKEY *v.* OHIO. Sup. Ct. Ohio. Reported below: 21 Ohio St. 2d 187, 257 N. E. 2d 65.

No. 69–5049. WILLIAMS *v.* GEORGIA. Sup. Ct. Ga. Reported below: 226 Ga. 140, 173 S. E. 2d 182.

No. 70–3. WALKER *v.* GEORGIA. Sup. Ct. Ga. Reported below: 226 Ga. 292, 174 S. E. 2d 440.

No. 70–5. LIMONE ET AL. *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Reported below: 357 Mass. 356, 259 N. E. 2d 195.

No. 71–1139. LIMONE ET AL. *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Reported below: —— Mass. ——, 276 N. E. 2d 698.

No. 70–5001. POLAND *v.* LOUISIANA. Sup. Ct. La. Reported below: 255 La. 746, 232 So. 2d 499.

No. 70–5003. CAPLER *v.* MISSISSIPPI. Sup. Ct. Miss. Reported below: 237 So. 2d 445.

No. 70–5006. HAMBY ET AL. *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 276 N. C. 674, 174 S. E. 2d 385.

No. 70–5008. DAVID, AKA DAVIS *v.* TEXAS. Ct. Crim. App. Tex. Reported below: 453 S. W. 2d 172.

No. 70–5011. THAMES *v.* TEXAS. Ct. Crim. App. Tex. Reported below: 453 S. W. 2d 495.

No. 70–5016. STRONG *v.* LOUISIANA. Sup. Ct. La. Reported below: 256 La. 455, 236 So. 2d 798.

No. 70–5017. FULLER *v.* SOUTH CAROLINA. Sup. Ct. S. C. Reported below: 254 S. C. 260, 174 S. E. 2d 774.

No. 70–5018. MILLER *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 276 N. C. 681, 174 S. E. 2d 481.

No. 70–5019. FOGG *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. Sup. Ct. Va. Reported below: See 208 Va. 541, 159 S. E. 2d 616.

No. 70–5022. TEA *v.* TEXAS. Ct. Crim. App. Tex. Reported below: 453 S. W. 2d 179.

No. 70–5023. DOUGLAS ET AL. *v.* LOUISIANA. Sup. Ct. La. Reported below: 256 La. 572, 237 So. 2d 382.

No. 70–5027. ALVAREZ *v.* NEBRASKA. Sup. Ct. Neb. Reported below: 185 Neb. 557, 177 N. W. 2d 591.

No. 70–5031. SELLARS *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Reported below: 430 F. 2d 1150.

No. 70–5034. TYLER *v.* WASHINGTON. Sup. Ct. Wash. Reported below: 77 Wash. 2d 726, 466 P. 2d 120.

No. 70–5043. HERRON *v.* TENNESSEE. Ct. Crim. App. Tenn. Reported below: 3 Tenn. Cr. App. 39, 456 S. W. 2d 873.

No. 70–5044. JACKSON *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Reported below: 428 F. 2d 1054.

No. 70–5046. JOHNSON *v.* MARYLAND. Ct. App. Md. Reported below: 258 Md. 597, 267 A. 2d 152.

No. 70–5050. BRICKHOUSE *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. Sup. Ct. Va.

No. 70–5051. JACKSON *v.* ALABAMA. Sup. Ct. Ala. Reported below: 286 Ala. 287, 239 So. 2d 303.

No. 70–5054. BRYSON *v.* OHIO. Sup. Ct. Ohio. Reported below: 22 Ohio St. 2d 224, 259 N. E. 2d 740.

No. 70–5062. CUNNINGHAM *v.* WARDEN, MARYLAND PENITENTIARY. Ct. App. Md. Reported below: See 247 Md. 404, 231 A. 2d 501.

No. 70–5065. MILLER *v.* GEORGIA. Sup. Ct. Ga. Reported below: 226 Ga. 730, 177 S. E. 2d 253.

No. 70–5066. WILLIAMS *v.* SMITH, WARDEN. C. A. 5th Cir. Reported below: 431 F. 2d 70.

No. 70–5067. MORALES *v.* TEXAS. Ct. Crim. App. Tex. Reported below: 458 S. W. 2d 56.

No. 70–5069. MCKENZIE *v.* TEXAS. Ct. Crim. App. Tex. Reported below: 450 S. W. 2d 341.

No. 70–5070. ANDERSON *v.* FLORIDA. Sup. Ct. Fla. Reported below: 241 So. 2d 390.

No. 70–5079. HENDERSON *v.* GEORGIA. Sup. Ct. Ga. Reported below: 227 Ga. 68, 179 S. E. 2d 76.

No. 70–5084. MOREHEAD *v.* OHIO. Sup. Ct. Ohio. Reported below: 24 Ohio St. 2d 166, 265 N. E. 2d 551.

No. 70–5221. STATEN *v.* OHIO. Sup. Ct. Ohio. Reported below: 25 Ohio St. 2d 107, 267 N. E. 2d 122.

No. 70–5326. ARRINGTON *v.* MARYLAND. C. A. 4th Cir.

No. 70–5394. BROWN *v.* FLORIDA. Sup. Ct. Fla. Reported below: 245 So. 2d 68.

No. 70–5400. WILLIAMS *v.* KENTUCKY. Ct. App. Ky. Reported below: 464 S. W. 2d 244.

No. 71–5008. BARTHOLOMEY *v.* MARYLAND. Ct. App. Md. Reported below: 260 Md. 504, 273 A. 2d 164.

No. 71–5114. SQUARE *v.* LOUISIANA. Sup. Ct. La. Reported below: 257 La. 743, 244 So. 2d 200.

No. 71–5184. SINCLAIR *v.* LOUISIANA. Sup. Ct. La. Reported below: 258 La. 84, 245 So. 2d 365.

No. 71–5192. TULL *v.* WARDEN, MARYLAND PENITENTIARY. Ct. App. Md. Reported below: 262 Md. 299, 278 A. 2d 599.

No. 71–5194. SEENEY *v.* DELAWARE. Sup. Ct. Del. Reported below: — Del. —, 277 A. 2d 670.

No. 71–5197. STRONG *v.* MARYLAND. Ct. App. Md. Reported below: 261 Md. 371, 275 A. 2d 491.

No. 71–5225. STEIGLER *v.* DELAWARE. Sup. Ct. Del. Reported below: — Del. —, 277 A. 2d 662.

No. 71–5228. CURRY *v.* TEXAS. Ct. Crim. App. Tex. Reported below: 468 S. W. 2d 455.

No. 71–5274. ELLIOTT *v.* OHIO. Sup. Ct. Ohio. Reported below: 25 Ohio St. 2d 249, 267 N. E. 2d 806.

No. 71–5359. CERNY *v.* WASHINGTON. Sup. Ct. Wash. Reported below: 78 Wash. 2d 845, 480 P. 2d 199.

No. 71–5369. TILFORD *v.* PAGE, WARDEN. C. A. 10th Cir. Reported below: See 307 F. Supp. 781.

No. 71–5395. WESTBROOK *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 279 N. C. 18, 181 S. E. 2d 572.

No. 71–5525. WHITE *v.* OHIO. Sup. Ct. Ohio. Reported below: 27 Ohio St. 2d 73, 271 N. E. 2d 804.

No. 71–5648. ALFORD *v.* EYMAN, WARDEN. C. A. 9th Cir. Reported below: 448 F. 2d 306.

No. 71–5744. PHELAN *v.* BRIERLEY, WARDEN. C. A. 3d Cir. Reported below: 453 F. 2d 73.

No. 71–5866. JOHNSON *v.* FLORIDA. Sup. Ct. Fla. Reported below: 252 So. 2d 361.

No. 71–6001. DOSS *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 279 N. C. 413, 183 S. E. 2d 671.

No. 71–6068. STANLEY *v.* TEXAS. Ct. Crim. App. Tex. Reported below: 471 S. W. 2d 72.

No. 71–6081. KASSOW *v.* OHIO. Sup. Ct. Ohio. Reported below: 28 Ohio St. 2d 141, 277 N. E. 2d 435.

No. 71–6137. GILMORE *v.* MARYLAND. Ct. App. Md. Reported below: 263 Md. 268, 283 A. 2d 371.

No. 71–6138. TERRY *v.* MISSOURI. Sup. Ct. Mo. Reported below: 472 S. W. 2d 426.

No. 71–6154. BOYKIN *v.* FLORIDA. Sup. Ct. Fla. Reported below: 257 So. 2d 251.

No. 71–6156. YOUNG *v.* OHIO. Sup. Ct. Ohio. Reported below: 27 Ohio St. 2d 310, 272 N. E. 2d 353.

No. 71–6183. MATTHEWS *v.* TEXAS. Ct. Crim. App. Tex. Reported below: 471 S. W. 2d 834.

No. 71–6204. BROWN *v.* VIRGINIA. Sup. Ct. Va. Reported below: 212 Va. 515, 184 S. E. 2d 786.

No. 71–6223. MUSIC *v.* WASHINGTON. Sup. Ct. Wash. Reported below: 79 Wash. 2d 699, 489 P. 2d 159.

No. 71–6224. CHANCE *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 279 N. C. 643, 185 S. E. 2d 227.

No. 71–6282. CANADAY *v.* WASHINGTON. Sup. Ct. Wash. Reported below: 79 Wash. 2d 647, 488 P. 2d 1064.

No. 71–6539. MENTHEN *v.* OKLAHOMA. Ct. Crim. App. Okla. Reported below: 492 P. 2d 351.

No. 71–6592. DELGADO *v.* CONNECTICUT. Sup. Ct. Conn. Reported below: 161 Conn. 536, 290 A. 2d 338.

No. 71–819. THOMAS ET AL. *v.* SHIRCK; and

No. 71–946. SHIRCK *v.* THOMAS ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Board of Regents of State Colleges* v. *Roth, ante,* p. 564. MR. JUSTICE DOUGLAS would affirm the judgment below. Reported below: 447 F. 2d 1025.

No. 71–5790. CANTY *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK. C. A. 2d Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Perry* v. *Sindermann, ante,* p. 593; *Board of Regents of State Colleges* v. *Roth, ante,* p. 564; and *Lynch* v. *Household Finance Corp.,* 405 U. S. 538.

MR. JUSTICE DOUGLAS would grant, vacate, and remand solely in light of *Lynch* v. *Household Finance Corp., supra.* Reported below: 448 F. 2d 428.

No. 69–5016. PITTS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Motion for leave to proceed *in forma pauperis* granted. Motion for leave to file petition for writ of habeas corpus denied. Treating the petition for writ of habeas corpus as a petition for writ of certiorari, certiorari granted. Judgment vacated insofar as it leaves undisturbed the death penalty imposed, and case remanded for further proceedings. See *Stewart* v. *Massachusetts, ante,* p. 845. Reported below: 185 So. 2d 164.

No. 69–5017. HAWKINS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Motion for leave to proceed *in forma pauperis* granted. Motion for leave to file petition for writ of habeas corpus denied. Treating the petition for writ of habeas corpus as a petition for writ of certiorari, certiorari granted. Judgment vacated insofar as it leaves undisturbed the death penalty imposed, and case remanded for further proceedings. See *Stewart* v. *Massachusetts, ante,* p. 845. Reported below: 199 So. 2d 276.

No. 70–5020. WILLIAMS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* granted. Motion for leave to file petition for writ of habeas corpus denied. Treating the petition for writ of habeas corpus as a petition for writ of certiorari, certiorari granted. Judgment vacated insofar as it leaves undisturbed the death penalty imposed, and case remanded for further proceedings. See *Stewart* v. *Massachusetts, ante,* p. 845. Reported below: See 228 So. 2d 377.

No. 204, October Term, 1970. CRAMPTON *v.* OHIO. Sup. Ct. Ohio. Petition for rehearing granted. Judgment affirming judgment of the Supreme Court of Ohio, 402 U. S. 183 (1971), vacated. Judgment, 18 Ohio St.

2d 182, 248 N. E. 2d 614 (1969), vacated insofar as it leaves undisturbed the death penalty imposed, and case remanded for further proceedings. See *Furman* v. *Georgia, ante,* p. 238.

Miscellaneous Orders

No. 71–1255. UNITED STATES *v.* ASH. C. A. D. C. Cir. [Certiorari granted, 407 U. S. 909.] Motion for appointment of counsel granted. It is ordered that Sherman L. Cohn, Esquire, of Washington, D. C., a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 71–575. GOMEZ *v.* PEREZ. Appeal from Ct. Civ. App. Tex., 4th Sup. Jud. Dist. [Probable jurisdiction noted, *ante,* p. 920.] Joseph Jaworski, Esquire, of Houston, Texas, a member of the Bar of this Court, is invited to brief and argue this case as *amicus curiae* in support of the judgment below.

Certiorari Denied. (See also No. 68–5012, *supra.*)

No. 70–228. WARDEN, MARYLAND PENITENTIARY *v.* RALPH; and

No. 70–5198. RALPH *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 438 F. 2d 786.

No. 71–1284. NEW JERSEY *v.* PRESHA ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 60 N. J. 60, 286 A. 2d 55.

No. 70–322. IN RE WARREN. Gen. Ct. Justice, Super. Ct. Div., Caswell County, N. C. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari, vacate judgment below, and remand case for further consideration in light of his opinion dissenting in part in *Morrissey* v. *Brewer, ante,* p. 471, at 491.

No. 70–141. HODGIN *v.* NOLAND. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion

that certiorari should be granted. Reported below: 435 F. 2d 859.

No. 70–354. FOODEN ET AL. *v.* BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES OF ILLINOIS. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 48 Ill. 2d 580, 272 N. E. 2d 497.

No. 71–430. CRABTREE *v.* BOARD OF EDUCATION, WELLSTON CITY SCHOOL DISTRICT, ET AL. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–6259. MCENTEGGART *v.* CATALDO ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 451 F. 2d 1109.

No. 71–249. ORR *v.* TRINTER ET AL. C. A. 6th Cir. Motions of National Education Assn. and Board of Education of the City of Washington C. H., Ohio, for leave to file briefs as *amici curiae* granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 444 F. 2d 128.

Rehearing Granted. (See No. 204, October Term, 1970, *supra.*)

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS—1969, 1970, AND 1971

	ORIGINAL			APPELLATE			MISCELLANEOUS			TOTALS		
Terms	1969	1970	1971	1969	1970	1971	1969	1970	1971	1969	1970	1971
Number of cases on dockets	15	20	18	1,758	1,903	2,070	2,429	2,289	2,445	4,202	4,212	4,533
Number disposed of during terms	5	7	8	1,433	1,541	1,628	1,971	1,774	2,009	3,409	3,322	3,645
Number remaining on dockets	10	13	10	325	362	442	458	515	436	793	890	888

	TERMS		
	1969	1970	1971
Cases argued during term	144	151	[1] 177
Number disposed of by full opinions	105	126	143
Number disposed of by per curiam opinions	21	22	[2] 24
Number set for reargument the following term	18	3	5
Cases granted review this term	150	161	[3] 163
Cases reviewed and decided without oral argument	113	192	286
Total cases to be available for argument at outset of following term	94	107	99

[1] Includes No. 9 Orig. (pending)
[2] Includes A-483 and No. 50 Orig.
[3] Includes A-483 and No. 9 Orig.

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1. *Line-haul carriers jointly acquiring control of switching railroad—Related application for trackage rights by one petitioner for inclusion.*—The denial of trackage rights to Southern Pacific (on the ground that SP was "not entitled to serve Peninsula or Rivergate") should be reconsidered by the Interstate Commerce Commission in conjunction with the reappraisal of the issues arising under § 5 (2) of the Interstate Commerce Act. Port of Portland v. United States, p. 811.

2. *Line-haul carriers petitioning for inclusion in control of switching railroad—ICC decision—Applicable legal principles.*—In view of uncertainties about the northern access to Portland's Rivergate industrial complex—given the physical limitations of the present facilities of Peninsula Terminal Co.—and the apparent fact that physical operation over Peninsula into Rivergate was not at issue here, approval of the ICC order, with its protective conditions, may still be in the public interest, but the announced grounds for the ICC decision do not comport with the applicable legal principles. Port of Portland v. United States, p. 811.

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3. *Line-haul carriers petitioning for inclusion in joint purchase of switching railroad—Market shares and existing traffic.*—In stressing the small share in Peninsula Terminal Co.'s traffic that Milwaukee Railroad had before the Northern Lines Merger, the ICC ignored any possible increase in that share after Condition 24 (a) of that merger took effect. In announcing a principle of preserving the market shares of the two railroads currently connecting with Peninsula, the ICC failed to explain why it was not taking into account the potentially enormous traffic over Peninsula, should Peninsula become the northern route into Portland's Rivergate industrial complex. Port of Portland v. United States, p. 811.

4. *Line-haul carriers seeking joint acquisition of switching railroad—Petitions for inclusion denied by ICC.*—On the record in this case (which is ambiguous with regard to many factual and procedural issues) it has not been shown that the ICC's order authorizing Union Pacific and Burlington Northern alone to acquire control of the Peninsula Terminal Co. met the "public interest" standard of § 5 (2) of the Interstate Commerce Act. Port of Portland v. United States, p. 811.

5. *Petitions for inclusion—Shifting market shares—Anticompetitive effects.*—The ICC's denial of inclusion of the Southern Pacific Transportation Co. and the Milwaukee Railroad because their gain would work a corresponding loss to Burlington Northern and Union Pacific is not a proper approach under § 5 (2) of the Interstate Commerce Act, given the principle that the anticompetitive effects of any § 5 (2) transaction must be explicitly considered. Port of Portland v. United States, p. 811.

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2. *Interrogation of Senator's aide—Scope of questioning.*—Aide may be questioned by the grand jury about the source of classified documents in the Senator's possession, as long as the questioning implicates no legislative act. The Court of Appeals' protective order in other respects would suffice if it forbade questioning the aide or others about the conduct or motives of the Senator or his aides at the subcommittee meeting; communications between the Senator and his aides relating to that meeting or any legislative act of the Senator; or steps of the Senator or his aides preparatory for the meeting, if not relevant to third-party crimes. Gravel v. United States, p. 606.

3. *Questioning Senator's aide—Protective order.*—The Court of Appeals' protective order was overly broad in enjoining interrogation of the aide with respect to any act, "in the broadest sense," that he performed within the scope of his employment, since the aide's immunity extended only to legislative acts as to which the Senator would be immune. Gravel v. United States, p. 606.

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Wounded prisoner in extreme pain, under the influence of morphine—Oral confession to hospital doctor.—Petitioner's oral confession was invalid, having been the product of gross coercion and part of the same "stream of events" that necessitated invalidation of the written confessions. Beecher v. Alabama, p. 234.

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I. Due Process.

1. *Arrest for parole violation—Revocation of parole.*—Though parole revocation does not call for the full panoply of rights due a defendant in a criminal proceeding, a parolee's liberty involves significant values within the protection of the Due Process Clause of the Fourteenth Amendment, and termination of that liberty requires an informal hearing to give assurance that the finding of a parole violation is based on verified facts to support the revocation. Morrissey v. Brewer, p. 471.

2. *Determination whether parole condition was violated.*—Due process requires a reasonably prompt informal inquiry conducted by an impartial hearing officer near the place of the alleged parole violation to determine if there is reasonable ground to believe that the arrested parolee has violated a parole condition. The parolee should receive prior notice of the inquiry, its purpose, and the alleged violations. The parolee may present relevant information and (absent security considerations) question adverse informants. The hearing officer shall digest the evidence on probable cause and state the reasons for holding the parolee for the parole board's decision. Morrissey v. Brewer, p. 471.

3. *Other shotgun improperly admitted into evidence—Claim not raised below.*—Petitioner's due process claim as to the shotgun was not previously raised and therefore is not properly before this Court, and in any event the introduction of the shotgun does not constitute federally reversible error. Moore v. Illinois, p. 786.

4. *Parolee arrested for parole violation—Hearing on proposed revocation of parole.*—At the revocation hearing, which must be conducted reasonably soon after the parolee's arrest, minimum due process requirements are: (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. Morrissey v. Brewer, p. 471.

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5. *Teacher hired for one academic year—Not rehired for ensuing year—No prior hearing.*—The Fourteenth Amendment does not require opportunity for a hearing prior to the nonrenewal of a nontenured state teacher's contract, unless he can show that the nonrenewal deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, despite the lack of tenure or a formal contract. Here the nonretention of respondent, absent any charges against him or stigma or disability foreclosing other employment, is not tantamount to a deprivation of "liberty," and the terms of his employment accorded him no "property" interest protected by procedural due process. Board of Regents v. Roth, p. 564.

II. Eighth Amendment.

1. *Conviction for murder—Death penalty imposed by jury.*—The sentence of death may not be imposed on petitioner. Moore v. Illinois, p. 786.

2. *Fourteenth Amendment—Death sentences imposed for rapes and murder.*—The imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings. Furman v. Georgia, p. 238; Stewart v. Massachusetts, p. 845.

III. First Amendment.

1. *Alien journalist—Marxist scholar invited to participate in academic conferences—Attorney General refused waiver of ineligibility.*—In the exercise of Congress' plenary power to exclude aliens or prescribe the conditions for their entry into this country, Congress in § 212 (a)(28) of the Immigration and Nationality Act of 1952 has delegated conditional exercise of this power to the Executive Branch. When, as in this case, the Attorney General decides for a legitimate and bona fide reason not to waive the statutory exclusion of an alien, courts will not look behind his decision or weigh it against the First Amendment interests of those who would personally communicate with the alien. Kleindienst v. Mandel, p. 753.

2. *Freedom of association—Assumed relationship with the National Students for a Democratic Society.*—Insofar as the college's denial of recognition to petitioners' group was based on an assumed relationship with the National SDS, or was a result of disagreement with the group's philosophy, or was a consequence of a fear of disruption, for which there was no support in the record, the college's

CONSTITUTIONAL LAW—Continued.
decision violated the petitioners' First Amendment rights. Healy v. James, p. 169.

3. *Freedom of association—Civil disorders—Army's compilation of data on civilian political activities.*—Civilians' claim that their First Amendment rights are chilled, due to the mere existence of the data-gathering system, does not constitute a justiciable controversy on the basis of the record in this case, disclosing as it does no showing of objective harm or threat of specific future harm. Laird v. Tatum, p. 1.

4. *Freedom of association—Leftist students organizing as Students for a Democratic Society—Denial of recognition as campus organization.*—Lower courts erred in (1) discounting the cognizable First Amendment associational interest that petitioners had in furthering their personal beliefs, and (2) assuming that the burden was on petitioners to show entitlement to recognition by the college rather than on the college to justify its nonrecognition of the group, once petitioners had made application conformably to college requirements. Healy v. James, p. 169.

5. *Freedom of expression—Peaceful picketing near school in violation of city ordinance.*—City ordinance prohibiting all picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute, is violative of the Equal Protection Clause of the Fourteenth Amendment since it makes an impermissible distinction between peaceful labor picketing and other peaceful picketing. Police Department of Chicago v. Mosley, p. 92; Grayned v. City of Rockford, p. 104.

6. *Freedom of speech—Antinoise ordinance—Mass demonstration while school is in session.*—Antinoise ordinance prohibiting a person while on grounds adjacent to a building in which a school is in session from willfully making a noise or diversion that disturbs or tends to disturb the peace or good order of the school session is not unconstitutionally vague since, with fair warning, it prohibits only actual or imminent, and willful, interference with normal school activity, and is not a broad invitation to discriminatory enforcement; nor is the ordinance overbroad as unduly interfering with First Amendment rights since expressive activity is prohibited only if it "materially disrupts classwork." Grayned v. City of Rockford, p. 104.

7. *Freedom of the press—Obscenity statute—Underground newspaper's publication of pictures of nudes and a sex poem.*—In the context in which they appeared, the photographs were rationally re-

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lated to a news article, in conjunction with which they appeared, and were entitled to First and Fourteenth Amendment protection. In view of the poem's content and placement with other poems inside the newspaper, its dominant theme cannot be said to appeal to prurient interest. Kois v. Wisconsin, p. 229.

8. *Newspaper reporters—Grand jury subpoenas—Protection of confidential sources.*—The First Amendment does not relieve a newspaper reporter of the obligation that all citizens have to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, and therefore the Amendment does not afford him a constitutional testimonial privilege for an agreement he makes to conceal facts relevant to a grand jury's investigation of a crime or to conceal the criminal conduct of his source or evidence thereof. Branzburg v. Hayes, p. 665.

9. *Professor's public statements critical of administration—One-year employment contract not renewed.*—Lack of a contractual or tenure right to re-employment, taken alone, did not defeat respondent's claim that the nonrenewal of his contract violated his free speech right under the First and Fourteenth Amendments. The District Court erred in foreclosing determination of the contested issue whether the decision not to renew was based on respondent's exercise of his right of free speech. Perry v. Sindermann, p. 593.

IV. Fourteenth Amendment.

1. *Due process—Wounded prisoner in extreme pain, under the influence of morphine—Oral confession to hospital doctor.*—Petitioner's oral confession was invalid, having been the product of gross coercion and part of the same "stream of events" that necessitated invalidation of the written confessions. Beecher v. Alabama, p. 234.

2. *Procedural due process—Proper basis for nonrecognition.*—Proper basis for nonrecognition of local chapter of SDS might have been afforded by a showing that the petitioners' group refused to comply with a rule requiring them to abide by reasonable campus regulations. Since the record is not clear whether the college has such a rule and, if so, whether petitioners intend to observe it, these issues remain to be resolved. Healy v. James, p. 169.

V. Fourth Amendment.

Warrant authorizing search for, and seizure of, stolen whiskey—Searched premises owned by petitioner's father—Petitioner not present.—Since the Government now suggests that the warrant was invalid, and since the record is inadequate for a determination of

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whether petitioner had an interest in the searched premises that would afford him standing under *Mancusi* v. *DeForte*, 392 U. S. 364, to challenge the legality of the search, the judgment of the Court of Appeals is vacated and the case remanded for further proceedings. Combs v. United States, p. 224.

VI. Sixth Amendment.

State's witness moved permanently to foreign country.—Where a State's witness is bona fide unavailable, the requirements of the Confrontation Clause are met when prior-recorded testimony of the witness is admitted in second trial if that prior testimony bears "indicia of reliability" that would afford "the trier of fact a satisfactory basis for evaluating the truth of the prior statement." Mancusi v. Stubbs, p. 204.

VII. Speech or Debate Clause.

1. *Former United States Senator charged with solicitation and acceptance of bribes—Vote on pending legislation.*—Although the Speech or Debate Clause protects Members of Congress from inquiry into legislative acts or the motivation for performance of such acts, it does not protect all conduct *relating* to the legislative process. Since in this case prosecution of the bribery charges does not necessitate inquiry into legislative acts or motivation, the District Court erred in holding that the Speech or Debate Clause required dismissal of the indictment. United States v. Brewster, p. 501.

2. *Interrogation of Senator's aide—Scope of questioning.*—Aide may be questioned by the grand jury about the source of classified documents in the Senator's possession, as long as the questioning implicates no legislative act. The Court of Appeals' protective order in other respects would suffice if it forbade questioning the aide or others about the conduct or motives of the Senator or his aides at the subcommittee meeting; communications between the Senator and his aides relating to that meeting or any legislative act of the Senator; or steps of the Senator or his aides preparatory for the meeting, if not relevant to third-party crimes. Gravel v. United States, p. 606.

3. *Questioning Senator's aide—Protective order.*—The Court of Appeals' protective order was overly broad in enjoining interrogation of the aide with respect to any act, "in the broadest sense," that he performed within the scope of his employment, since the aide's immunity extended only to legislative acts as to which the Senator would be immune. Gravel v. United States, p. 606.

CONSTITUTIONAL LAW—Continued.

4. *Senate subcommittee meeting—Chairman's aide's preparations for meeting.*—The Speech or Debate Clause applies not only to a Member of Congress but also to his aide, insofar as the aide's conduct would be a protected legislative act if performed by the Member himself. Gravel v. United States, p. 606.

5. *Senate subcommittee meeting—Classified documents in public record—Grand jury investigating private republication.*—The Speech or Debate Clause does not extend immunity to the Senator's aide from testifying before the grand jury about the alleged arrangement for private publication of the Pentagon Papers, as such publication had no connection with the legislative process. Gravel v. United States, p. 606.

6. *Testimonial privilege.*—Senator's aide had no nonconstitutional testimonial privilege from being questioned by the grand jury in connection with its inquiry into whether private publication of the Pentagon Papers violated federal law. Gravel v. United States, p. 606.

CONTEMPT. See **Constitutional Law**, III, 8; **Grand Juries**, 1, 4.

CONTINGENCY PLANS. See **Constitutional Law**, III, 3; **Justiciability.**

CONTRACTS OF EMPLOYMENT. See **Constitutional Law**, I, 5; III, 9; **Procedure**, 2–3.

CONTROLLING STOCKHOLDERS. See **Taxes**, 1–3.

CONVICTIONS. See **Constitutional Law**, VI; **Mootness**; **Witnesses.**

CORPORATE DIRECTORS. See **Taxes**, 1–3.

CORPORATIONS. See **Taxes**, 1–3.

COUNSEL. See **Constitutional Law**, VI; **Mootness**; **Witnesses.**

COURT ORDERS. See **Constitutional Law**, III, 8; **Grand Juries**, 4.

CRIMINAL LAW. See also **Appeals**, 1–3; **Confessions**; **Constitutional Law**, I, 1–4; II, 1–2; III, 6–8; IV, 1; V; VI; VII, 1–6; **Evidence**, 1–3; **Grand Juries**, 1–5; **Mootness**; **Parolles**, 1–3; **Procedure**, 1; **Witnesses.**

1. *Death sentences imposed for rapes and murder.*—The imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence

CRIMINAL LAW—Continued.

imposed, and the cases are remanded for further proceedings. Furman v. Georgia, p. 238.

2. *Eighth Amendment—Conviction for murder—Death penalty imposed by jury.*—The sentence of death may not be imposed on petitioner. Moore v. Illinois, p. 786.

3. *Pretrial motion for disclosure—Criminal trial—Items of evidence helpful to the defense.*—The evidentiary items (other than a diagram) on which petitioner bases his suppression claim relate to a witness' misidentification of petitioner as "Slick" and not to the identification, by that witness and others, of petitioner as the person who made the incriminating statements. These evidentiary items are not material under the standard of *Brady* v. *Maryland*, 373 U. S. 830. Moore v. Illinois, p. 786.

4. *Pretrial motion for disclosure—Murder trial—Item of evidence helpful to the defense.*—A diagram showing the positions of customers at a bar where a shotgun slaying occurred does not support petitioner's contention that the State knowingly permitted false testimony to remain uncorrected, in violation of *Napue* v. *Illinois*, 360 U. S. 264, since the diagram does not show that it was impossible for a prosecution witness to see the shooting. Moore v. Illinois, p. 786.

CRITICISM OF SCHOOL ADMINISTRATION. See **Constitutional Law**, I, 5; III, 9; **Procedure**, 2–3.

CROSS-EXAMINATIONS. See **Constitutional Law**, I, 1–2, 4; VI; **Mootness**; **Paroles**, 1–3; **Witnesses.**

CRUEL AND UNUSUAL PUNISHMENT. See **Constitutional Law**, II, 1–2; **Criminal Law**, 1.

CUSTODY. See **Constitutional Law**, I, 1–2, 4; **Paroles**, 1–3.

DATA-GATHERING SYSTEMS. See **Constitutional Law**, III, 3; **Justiciability.**

DEATH PENALTY. See **Constitutional Law**, II, 2; **Criminal Law**, 1.

DEATH SENTENCES. See **Constitutional Law**, II, 2; **Criminal Law**, 1.

DECEDENTS' ESTATES. See **Taxes**, 1–3.

DE FACTO TENURE PROGRAMS. See **Constitutional Law**, III, 9; **Procedure**, 2.

DEFENSE DEPARTMENT. See **Appeals**, 2–3; **Constitutional Law**, III, 3; VII, 2–6; **Grand Juries**, 2–3, 5; **Justiciability.**

DEFENSES. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Grand Juries**, 1; **Procedure**, 1.

DEMONSTRATIONS. See **Constitutional Law**, III, 5–6.

DENIAL OF RECOGNITION. See **Constitutional Law**, III, 2, 4; IV, 2.

DETERRENT TO CAPITAL CRIMES. See **Constitutional Law**, II, 2; **Criminal Law**, 1.

DETROIT. See **Constitutional Law**, III, 3; **Justiciability.**

DIRECT APPEALS. See **Appeals**, 1; **Constitutional Law**, VII, 1.

DISCLOSURE OF EVIDENCE. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Procedure**, 1.

DISCRETIONARY AUTHORITY. See **Constitutional Law**, III, 1; **Immigration and Nationality Act**; **Judicial Review**, 1.

DISCRETION OF JUDGE OR JURY. See **Constitutional Law**, II, 2; **Criminal Law**, 1.

DISCRIMINATORY PENALTIES. See **Constitutional Law**, II, 2; **Criminal Law**, 1.

DISMISSAL OF TEACHERS. See **Constitutional Law**, I, 5; **Procedure**, 3.

DISORDERLY CONDUCT. See **Constitutional Law**, III, 6.

DISORDERS. See **Constitutional Law**, III, 3; **Justiciability.**

DISRUPTION OF SCHOOLS. See **Constitutional Law**, III, 5–6.

DIVIDEND POLICY. See **Taxes**, 1–3.

DOMESTIC VIOLENCE. See **Constitutional Law**, III, 3; **Justiciability.**

DRUGS. See **Confessions**; **Constitutional Law**, III, 8; IV, 2; **Grand Juries**, 4.

DUE PROCESS. See **Constitutional Law**, I, 1–5; II, 1–2; III, 6, 9; **Criminal Law**, 1–4; **Evidence**, 1–2; **Paroles**, 1–3; **Procedure**, 1–3.

DUTY TO DISCLOSE EVIDENCE. See **Constitutional Law**, I, 2; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Procedure**, 1.

ECONOMIC EFFECTS. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

EIGHTH AMENDMENT. See **Constitutional Law**, I, 3; II, 1–2; **Criminal Law**, 1–4; **Evidence**, 1–2; **Procedure**, 1.

ELECTRONIC SURVEILLANCE. See **Grand Juries**, 1.

EMPLOYER AND EMPLOYEES. See **Constitutional Law**, I, 5; III, 9; **Procedure**, 2–3.

ENTRY OF ALIENS. See **Constitutional Law**, III, 1; **Immigration and Nationality Act**; **Judicial Review**, 1.

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law**, II, 2; III, 5–6; **Criminal Law**, 1.

ESTATES AND TRUSTS. See **Taxes**, 1–3.

EVIDENCE. See also **Administrative Procedure**, 1–5; **Constitutional Law**, I, 1–4; II, 1; V; **Criminal Law**, 2–4; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6; **Mootness**; **Paroles**, 1–3; **Procedure**, 1; **Witnesses.**

1. *Pretrial motion for disclosure—Criminal trial—Items of evidence helpful to the defense.*—The evidentiary items (other than a diagram) on which petitioner bases his suppression claim relate to a witness' misidentification of petitioner as "Slick" and not to the identification, by that witness and others, of petitioner as the person who made the incriminating statements. These evidentiary items are not material under the standard of *Brady* v. *Maryland*, 373 U. S. 830. Moore v. Illinois, p. 786.

2. *Pretrial motion for disclosure—Murder trial—Item of evidence helpful to the defense.*—A diagram showing the positions of customers at a bar where a shotgun slaying occurred does not support petitioner's contention that the State knowingly permitted false testimony to remain uncorrected, in violation of *Napue* v. *Illinois*, 360 U. S. 264, since the diagram does not show that it was impossible for a prosecution witness to see the shooting. Moore v. Illinois, p. 786.

3. *Warrant authorizing search for, and seizure of, stolen whiskey—Searched premises owned by petitioner's father—Petitioner not present.*—Since the Government now suggests that the warrant was invalid, and since the record is inadequate for a determination of whether petitioner had an interest in the searched premises that would afford him standing under *Mancusi* v. *DeForte*, 392 U. S. 364, to challenge the legality of the search, the judgment of the Court of Appeals is vacated and the case remanded for further proceedings. Combs v. United States, p. 224.

EXCLUSION OF ALIENS. See **Constitutional Law**, III, 1; **Immigration and Nationality Act**; **Judicial Review**, 1.

EXCULPATORY EVIDENCE. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Procedure**, 1.

EXECUTIONS. See **Constitutional Law**, II, 2; **Criminal Law**, 1.

EXECUTIVE DISCRETIONARY AUTHORITY. See **Constitutional Law**, III, 1; **Immigration and Nationality Act**; **Judicial Review**, 1.

"EXPECTANCY" OF RE-EMPLOYMENT. See **Constitutional Law**, III, 9; **Procedure**, 2.

EYEWITNESSES. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Procedure**, 1.

FACULTY MEMBERS. See **Constitutional Law**, III, 9; **Procedure**, 2.

FAIR TRIALS. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Procedure**, 1.

FALSE EVIDENCE. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Procedure**, 1.

FALSE TESTIMONY. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Procedure**, 1.

FAMILY CORPORATIONS. See **Taxes**, 1–3.

FEDERAL CRIMES. See **Appeals**, 1–3; **Constitutional Law**, III, 8; V; VII, 1–6; **Evidence**, 3; **Grand Juries**, 1–5; **Jurisdiction.**

FEDERAL ESTATE TAXES. See **Taxes**, 1–3.

FEDERAL GRAND JURIES. See **Grand Juries**, 1.

FEDERAL-STATE RELATIONS. See **Constitutional Law**, II, 2; **Criminal Law**, 1.

FIFTH AMENDMENT. See **Grand Juries**, 1.

FIRST AMENDMENT. See **Constitutional Law**, III, 1–9; IV, 2; **Grand Juries**, 4; **Immigration and Nationality Act**; **Judicial Review**, 1; **Justiciability**; **Procedure**, 1–2.

FOREIGN WITNESSES. See **Constitutional Law**, VI; **Mootness**; **Witnesses.**

FORT HOLABIRD. See **Constitutional Law**, III, 3; **Justiciability.**

FOURTEENTH AMENDMENT. See **Confessions**; **Constitutional Law**, I, 1–5; II, 1–2; III, 2, 4–7, 9; IV, 1–2; **Criminal Law**, 1–4; **Evidence**, 1–2; **Paroles**, 1–3; **Procedure**, 1–3.

FOURTH AMENDMENT. See **Constitutional Law**, V; **Evidence**, 3.

FREEDOM OF ASSOCIATION. See **Constitutional Law**, III, 1–2, 4; IV, 2; **Immigration and Nationality Act**; **Judicial Review**, 1.

FREEDOM OF EXPRESSION. See **Constitutional Law,** III, 2, 4–6; IV, 2.

FREEDOM OF SPEECH. See **Constitutional Law,** I, 5; III, 9; **Procedure,** 2–3.

FREEDOM OF THE PRESS. See **Constitutional Law,** III, 7–8; **Grand Juries,** 4.

FREIGHT CARS. See **Administrative Procedure,** 1–5; **Interstate Commerce Commission,** 1–5; **Judicial Review,** 2–6.

GENERAL IMMUNITY FROM CRIMINAL LAWS. See **Appeals,** 2–3; **Constitutional Law,** VII, 2–6; **Grand Juries,** 2–3, 5.

GEORGIA. See **Constitutional Law,** II, 2; **Criminal Law,** 1.

GIFTS. See **Taxes,** 1–3.

GOOD-FAITH EFFORTS. See **Constitutional Law,** VI; **Mootness; Witnesses.**

GOVERNMENT BENEFITS. See **Constitutional Law,** III, 9; **Procedure,** 2.

GRAND JURIES. See also **Appeals,** 2–3; **Constitutional Law,** III, 8; VII, 2–6.

1. *Grand jury investigation—Refusal to testify—Questions based on information from intercepted conversations.*—Where a grand jury witness is adjudicated in civil contempt under 28 U. S. C. § 1826 (a) for refusing "without just cause shown to comply with an order of the court to testify," the witness may invoke as a defense 18 U. S. C. § 2515, which directs that "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any . . . proceeding in or before any . . . grand jury . . . ," since a showing that the interrogation would be based upon the illegal interception would constitute the "just cause" that precludes a finding of contempt. Gelbard v. United States, p. 41.

2. *Interrogation of Senator's aide—Scope of questioning.*—Aide may be questioned by the grand jury about the source of classified documents in the Senator's possession, as long as the questioning implicates no legislative act. The Court of Appeals' protective order in other respects would suffice if it forbade questioning the aide or others about the conduct or motives of the Senator or his aides at the subcommittee meeting; communications between the Senator and his aides relating to that meeting or any legislative act of the Senator; or steps of the Senator or his aides preparatory

GRAND JURIES—Continued.

for the meeting, if not relevant to third-party crimes. Gravel v. United States, p. 606.

3. *Investigation—Testimonial privilege.*—Senator's aide had no nonconstitutional testimonial privilege from being questioned by the grand jury in connection with its inquiry into whether private publication of the Pentagon Papers violated federal law. Gravel v. United States, p. 606.

4. *Newspaper reporters—Grand jury subpoenas—Protection of confidential sources.*—The First Amendment does not relieve a newspaper reporter of the obligation that all citizens have to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, and therefore the Amendment does not afford him a constitutional testimonial privilege for an agreement he makes to conceal facts relevant to a grand jury's investigation of a crime or to conceal the criminal conduct of his source or evidence thereof. Branzburg v. Hayes, p. 665.

5. *Senate subcommittee meeting—Classified documents in public record—Grand jury investigating private republication.*—The Speech or Debate Clause does not extend immunity to the Senator's aide from testifying before the grand jury about the alleged arrangement for private publication of the Pentagon Papers, as such publication had no connection with the legislative process. Gravel v. United States, p. 606.

GROSS COERCION. See **Confessions; Constitutional Law**, IV, 1.

GROSS ESTATES. See **Taxes**, 1–3.

HABEAS CORPUS. See **Constitutional Law**, VI; **Mootness; Witnesses.**

HARMLESS ERROR. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Procedure**, 1.

HARRISBURG. See **Grand Juries**, 1.

HARSH PENALTIES. See **Constitutional Law**, II, 2; **Criminal Law**, 1.

HASHISH. See **Constitutional Law**, III, 8; **Grand Juries**, 4.

HEARINGS. See **Constitutional Law**, I, 1–2, 4–5; III, 9; **Paroles**, 1–3; **Procedure**, 2–3.

HIGH SCHOOLS. See **Constitutional Law**, III, 5–6.

HOSPITAL AUTHORITIES. See **Confessions; Constitutional Law**, IV, 1.

IDENTIFICATION OF SOURCES. See **Constitutional Law**, III, 8; **Grand Juries**, 4.

IDENTIFICATIONS. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Procedure**, 1.

ILLINOIS. See **Constitutional Law**, I, 3; II, 1; III, 5–6; **Criminal Law**, 2–4; **Evidence**, 1–2; **Procedure**, 1.

IMMIGRATION AND NATIONALITY ACT. See also **Constitutional Law**, III, 1; **Judicial Review**, 1.

Alien journalist—Marxist scholar invited to participate in academic conferences—Attorney General refused waiver of ineligibility.—In the exercise of Congress' plenary power to exclude aliens or prescribe the conditions for their entry into this country, Congress in § 212 (a) (28) of the Immigration and Nationality Act of 1952 has delegated conditional exercise of this power to the Executive Branch. When, as in this case, the Attorney General decides for a legitimate and bona fide reason not to waive the statutory exclusion of an alien, courts will not look behind his decision or weigh it against the First Amendment interests of those who would personally communicate with the alien. Kleindienst v. Mandel, p. 753.

IMMUNITY FROM PROSECUTION. See **Appeals**, 1; **Constitutional Law**, VII, 1; **Jurisdiction.**

IMMUNITY FROM TESTIFYING. See **Appeals**, 2–3; **Constitutional Law**, VII, 2–6; **Grand Juries**, 2–3, 5.

IMPARTIAL HEARING OFFICERS. See **Constitutional Law**, I, 1–2, 4; **Paroles**, 1–3.

IMPEACHMENT OF IDENTIFICATION. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Procedure**, 1.

INCLUSION IN GROSS ESTATE. See **Taxes**, 1–3.

INCLUSION PETITIONS. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

INCOME FROM TRUST. See **Taxes**, 1–3.

INCRIMINATING STATEMENTS. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Procedure**, 1.

INDEPENDENCE OF LEGISLATURE. See **Appeals**, 1; **Constitutional Law**, VII, 1; **Jurisdiction.**

INDICIA OF RELIABILITY. See **Constitutional Law**, VI; **Mootness**; **Witnesses.**

INDICTMENTS. See **Appeals**, 1; **Constitutional Law**, VII, 1; **Jurisdiction.**

INELIGIBILITY FOR ADMISSION. See **Constitutional Law**, III, 1; **Immigration and Nationality Act**; **Judicial Review**, 1.

INFLAMMATORY EVIDENCE. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Procedure**, 1.

INFORMAL INQUIRIES. See **Constitutional Law**, I, 1–2, 4; **Paroles**, 1–3.

INHIBITING EFFECT. See **Constitutional Law**, III, 3; **Justiciability.**

INSUBORDINATION. See **Constitutional Law**, III, 9; **Procedure**, 2.

INSURRECTIONS. See **Constitutional Law**, III, 3; **Justiciability.**

INTELLIGENCE AGENCIES. See **Constitutional Law**, III, 3; **Justiciability.**

INTERCEPTED CONVERSATIONS. See **Grand Juries**, 1.

INTERCHANGE TRACKS. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

INTEREST IN "LIBERTY." See **Constitutional Law**, I, 5; **Procedure**, 3.

INTERNAL REVENUE CODE. See **Taxes**, 1–3.

INTERROGATIONS. See **Grand Juries**, 1.

INTERSTATE COMMERCE COMMISSION. See also **Administrative Procedure**, 1–5; **Judicial Review**, 2–6.

1. *Line-haul carriers jointly acquiring control of switching railroad—Related application for trackage rights by one petitioner for inclusion.*—The denial of trackage rights to Southern Pacific (on the ground that SP was "not entitled to serve Peninsula or Rivergate") should be reconsidered by the ICC, in conjunction with the reappraisal of the issues arising under § 5 (2) of the Interstate Commerce Act. Port of Portland v. United States, p. 811.

2. *Line-haul carriers petitioning for inclusion in control of switching railroad—ICC decision—Applicable legal principles.*—In view of uncertainties about the northern access to Portland's Rivergate industrial complex—given the physical limitations of the present facilities of Peninsula Terminal Co.—and the apparent fact that physical operation over Peninsula into Rivergate was not at issue here, approval of the ICC order, with its protective con-

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ditions, may still be in the public interest, but the announced grounds for the ICC decision do not comport with the applicable legal principles. Port of Portland v. United States, p. 811.

3. *Line-haul carriers petitioning for inclusion in joint purchase of switching railroad—Market shares and existing traffic.*—In stressing the small share in Peninsula Terminal Co.'s traffic that Milwaukee Railroad had before the Northern Lines Merger, the ICC ignored any possible increase in that share after Condition 24 (a) of that merger took effect. In announcing a principle of preserving the market shares of the two railroads currently connecting with Peninsula, the ICC failed to explain why it was not taking into account the potentially enormous traffic over Peninsula, should Peninsula become the northern route into Portland's Rivergate industrial complex. Port of Portland v. United States, p. 811.

4. *Line-haul carriers seeking joint acquisition of switching railroad—Petitions for inclusion denied by ICC.*—On the record in this case (which is ambiguous with regard to many factual and procedural issues) it has not been shown that the ICC's order authorizing Union Pacific and Burlington Northern alone to acquire control of the Peninsula Terminal Co. met the "public interest" standard of § 5 (2) of the Interstate Commerce Act. Port of Portland v. United States, p. 811.

5. *Petitions for inclusion—Shifting market shares—Anticompetitive effects.*—The ICC's denial of inclusion of the Southern Pacific Transportation Co. and the Milwaukee Railroad because their gain would work a corresponding loss to Burlington Northern and Union Pacific is not a proper approach under § 5 (2) of the Interstate Commerce Act, given the principle that the anticompetitive effects of any § 5 (2) transaction must be explicitly considered. Port of Portland v. United States, p. 811.

INTERSTATE SHIPMENTS. See **Constitutional Law**, V; **Evidence**, 3.

INTER VIVOS TRUSTS. See **Taxes**, 1–3.

INVALIDITY OF STATUTES. See **Appeals**, 1; **Constitutional Law**, VII, 1; **Jurisdiction.**

INVASION OF PRIVACY. See **Grand Juries**, 1.

INVESTIGATIONS. See **Appeals**, 2–3; **Constitutional Law**, III, 8; VII, 2–6; **Grand Juries**, 2–5.

INVESTIGATIVE AGENCIES. See **Constitutional Law**, III, 3; **Justiciability.**

INVOCATION OF THE PRIVILEGE. See **Appeals**, 2–3; **Constitutional Law**, VII, 2–6; **Grand Juries**, 2–3, 5.

IOWA. See **Constitutional Law**, I, 1–2, 4; **Paroles**, 1–3.

IRRELEVANT EVIDENCE. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 2–3; **Procedure**, 1.

IRREVOCABLE TRUSTS. See **Taxes**, 1–3.

JOB SECURITY. See **Constitutional Law**, I, 5; III, 9; **Procedure**, 2–3.

JOINT ACQUISITIONS. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

JUDGMENTS. See **Appeals**, 1; **Constitutional Law**, VII, 1; **Jurisdiction.**

JUDICIAL OFFICERS. See **Constitutional Law**, III, 1–2, 4; **Paroles**, 1–3.

JUDICIAL REVIEW. See also **Administrative Procedure**, 1–5; **Appeals**, 2–3; **Constitutional Law**, III, 1, 3; V; VII, 2–6; **Evidence**, 3; **Immigration and Nationality Act**; **Interstate Commerce Commission**, 1–5; **Justiciability.**

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JUDICIAL REVIEW—Continued.

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JUNIOR COLLEGE PROFESSORS. See **Constitutional Law**, III, 9; **Procedure**, 2.

JURISDICTION. See also **Appeals**, 1; **Constitutional Law**, VII, 1.

District Court "decision or judgment setting aside, or dismissing" the indictment—Direct appeal.—This Court has jurisdiction under 18 U. S. C. § 3731 (1964 ed., Supp. V) to hear the appeal, since the District Court's order was based upon its determination of the constitutional invalidity of 18 U. S. C. §§ 201 (c)(1) and 201 (g) on the facts as alleged in the indictment. United States v. Brewster, p. 501.

"JUST CAUSE" SHOWN. See **Grand Juries**, 1.

JUSTICIABILITY. See also **Constitutional Law**, III, 3.

First Amendment—Freedom of association—Civil disorders—Army's compilation of data on civilian political activities.—Civilians' claim that their First Amendment rights are chilled, due to the mere existence of the data-gathering system, does not constitute a justiciable controversy on the basis of the record in this case, disclosing as it does no showing of objective harm or threat of specific future harm. Laird v. Tatum, p. 1.

KALEIDOSCOPE. See **Constitutional Law**, III, 7.

KENTUCKY. See **Constitutional Law**, III, 8; **Grand Juries**, 4.

KIDNAPING. See **Grand Juries**, 1.

LABOR DISPUTES. See **Constitutional Law**, III, 5–6.

LAS VEGAS. See **Grand Juries**, 1.

LAWFUL POLITICAL ACTIVITY. See **Constitutional Law**, III, 3; **Justiciability.**

LEFT-WING STUDENTS. See **Constitutional Law**, III, 2, 4; IV, 2.

LEGAL CONSTRAINTS. See **Taxes**, 1–3.

LEGALITY OF SEARCH. See **Constitutional Law**, V; **Evidence**, 3.

LEGAL STANDARDS. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

LEGISLATIVE ACTS. See **Appeals**, 1–3; **Constitutional Law**, VII, 1–6; **Grand Juries**, 2–3, 5; **Jurisdiction.**

LEGISLATIVE INDEPENDENCE. See **Appeals**, 1; **Constitutional Law**, VII, 1; **Jurisdiction.**

LIBERTY OF PAROLEES. See **Constitutional Law**, I, 1–2, 4; **Paroles**, 1–3.

LINE-HAUL CARRIERS. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

LOCAL CHAPTERS. See **Constitutional Law**, III, 7.

LOUISVILLE. See **Constitutional Law**, III, 8; **Grand Juries**, 4.

MANAGEMENT POWERS. See **Taxes**, 1–3.

MANDATORY SENTENCES. See **Constitutional Law**, II, 2; **Criminal Law**, 1.

MARIHUANA. See **Constitutional Law**, III, 8; **Grand Juries**, 4.

MARKET SHARES. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

MARXIST THEORETICIAN. See **Constitutional Law**, III, 1; **Immigration and Nationality Act**; **Judicial Review**, 1.

MASSACHUSETTS. See **Constitutional Law**, III, 8; **Grand Juries**, 4.

MATERIALITY. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Procedure**, 1.

MEMBERS OF CONGRESS. See **Appeals**, 1–3; **Constitutional Law**, VII, 1–6; **Grand Juries**, 2–3, 5; **Jurisdiction.**

MERGERS. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

MILWAUKEE RAILROAD. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

MINORITY STOCKHOLDERS. See **Taxes**, 1–3.

MISCONDUCT OF MEMBERS. See **Appeals**, 1; **Constitutional Law**, VII, 1; **Jurisdiction.**

MISTAKEN IDENTITY. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Procedure**, 1.

MOOTNESS. See also **Constitutional Law**, VI; **Witnesses.**

Second-offender sentence in New York based on previous Tennessee felony conviction—Tennessee conviction allegedly unconstitutional—Previous Texas conviction still on appeal.—New York State's resentencing of respondent did not moot the instant case since his appeal involving the validity of still another conviction, in Texas, is still in the New York state courts and therefore New York State has a present interest in the availability of the Tennessee conviction as a predicate for the stiffer punishment. Mancusi v. Stubbs, p. 204.

MORPHINE. See **Confessions**; **Constitutional Law**, IV, 1.

MOTION FOR DISCLOSURE. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Procedure**, 1.

MOTIONS TO SUPPRESS. See **Constitutional Law**, V; **Evidence**, 3.

MOTION TO QUASH SUBPOENA. See **Appeals**, 2–3; **Constitutional Law**, III, 8; VII, 2–6; **Grand Juries**, 2–5.

MOTIVATION FOR LEGISLATIVE ACTS. See **Appeals**, 1; **Constitutional Law**, VII, 1; **Jurisdiction.**

MOTIVES OF SENATORS. See **Appeals**, 2–3; **Constitutional Law**, VII, 2–6; **Grand Juries**, 2–3, 5.

MUNICIPALITIES. See **Constitutional Law**, III, 5–6.

MURDER. See **Constitutional Law**, II, 2; **Criminal Law**, 1.

MURDER WEAPONS. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Procedure**, 1.

NATIONAL SDS. See **Constitutional Law**, III, 2, 4; IV, 2.

NEGRO STUDENTS. See **Constitutional Law**, III, 5–6.

"NEUTRAL AND DETACHED" HEARING BODY. See **Constitutional Law**, I, 1–2, 4; **Paroles**, 1–3.

NEVADA. See **Grand Juries**, 1.

NEW BEDFORD. See **Constitutional Law**, III, 8; **Grand Juries**, 4.

NEWS ARTICLES. See **Constitutional Law**, III, 7.

NEWSMAN'S PRIVILEGE. See **Constitutional Law**, III, 8; **Grand Juries**, 4.

NEWSPAPER REPORTERS. See **Constitutional Law**, III, 8; **Grand Juries**, 4.

NEW YORK. See **Constitutional Law**, VI; **Mootness**; **Witnesses.**

NEW YORK TIMES. See **Constitutional Law**, III, 8; **Grand Juries**, 4.

NONIMMIGRATION VISAS. See **Constitutional Law**, III, 1; **Immigration and Nationality Act**; **Judicial Review**, 1.

NONRECOGNITION OF STUDENT ORGANIZATIONS. See **Constitutional Law**, III, 2, 4; IV, 2.

NONRETENTION. See **Constitutional Law**, III, 9; **Procedure**, 2.

NONTENURED TEACHERS. See **Constitutional Law**, I, 5; III, 9; **Procedure**, 2–3.

NORTHERN LINES MERGER. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

NOTICE. See **Constitutional Law**, I, 1–2, 4; **Paroles**, 1–3.

OBJECTIVE HARM. See **Constitutional Law**, III, 3; **Justiciability.**

OBSCENITY. See **Constitutional Law**, III, 7.

ODESSA JUNIOR COLLEGE. See **Constitutional Law**, III, 9; **Procedure**, 2.

OFFICIAL ACTS. See **Appeals**, 1; **Constitutional Law**, VII, 1; **Jurisdiction.**

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT. See **Grand Juries**, 1.

ONE-YEAR CONTRACTS. See **Constitutional Law**, III, 9; **Procedure**, 2.

OPPORTUNITY TO BE HEARD. See **Constitutional Law**, I, 1–2; 4; **Paroles**, 1–3.

ORAL CONFESSIONS. See **Confessions**; **Constitutional Law**, IV, 1.

ORDINANCES. See **Constitutional Law**, III, 5–6.

OREGON. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

ORGANIZED CRIME CONTROL ACT. See **Grand Juries.**

OVERBREADTH. See **Constitutional Law**, III, 3, 5–6; **Justiciability.**

PAROLES. See also **Constitutional Law**, I, 1–2, 4.

1. *Arrest for parole violation—Revocation of parole.*—Though parole revocation does not call for the full panoply of rights due a defendant in a criminal proceeding, a parolee's liberty involves significant values within the protection of the Due Process Clause of the Fourteenth Amendment, and termination of that liberty requires an informal hearing to give assurance that the finding of a parole violation is based on verified facts to support the revocation. Morrissey v. Brewer, p. 471.

2. *Determination whether parole condition was violated.*—Due process requires a reasonably prompt informal inquiry conducted by an impartial hearing officer near the place of the alleged parole violation to determine if there is reasonable ground to believe that

PAROLES—Continued.

the arrested parolee has violated a parole condition. The parolee should receive prior notice of the inquiry, its purpose, and the alleged violations. The parolee may present relevant information and (absent security considerations) question adverse informants. The hearing officer shall digest the evidence on probable cause and state the reasons for holding the parolee for the parole board's decision. Morrissey v. Brewer, p. 471.

3. *Parolee arrested for parole violation—Hearing on proposed revocation of parole.*—At the revocation hearing, which must be conducted reasonably soon after the parolee's arrest, minimum due process requirements are: (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. Morrissey v. Brewer, p. 471.

PEACEFUL PICKETING. See **Constitutional Law**, III, 5–6.

PENALTIES. See **Constitutional Law**, II, 2; **Criminal Law**, 1.

PENINSULA TERMINAL CO. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

PENITENTIARIES. See **Constitutional Law**, I, 1–2, 4; **Paroles**, 1–3.

PENNSYLVANIA. See **Grand Juries**, 1.

PENTAGON PAPERS. See **Appeals**, 2–3; **Constitutional Law**, VII, 2–6; **Grand Juries**, 2–3, 5.

PERFORMANCE OF OFFICIAL ACTS. See **Appeals**, 1; **Constitutional Law**, VII, 1.

PERSONAL-ENTRY RIGHT. See **Constitutional Law**, III, 1; **Immigration and Nationality Act**; **Judicial Review**, 1.

PETITIONS FOR INCLUSION. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

PHOTOGRAPHS. See **Constitutional Law**, III, 7.

PICKETING. See **Constitutional Law**, III, 5–6.

PICTURES. See **Constitutional Law**, III, 7.

POETRY. See **Constitutional Law**, III, 7.

POLICE INVESTIGATIONS. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Procedure**, 1.

POLICE OFFICERS. See **Confessions**; **Constitutional Law**, I, 1–2, 4; IV, 1; **Paroles**, 1–3.

POLITICAL ACTIVITIES. See **Appeals**, 1; **Constitutional Law**, III, 3; VII, 1; **Jurisdiction**; **Justiciability.**

PORTLAND. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

PORTRAYALS OF SEX. See **Constitutional Law**, III, 7.

POSSESSORY CLAIMS. See **Constitutional Law**, V; **Evidence**, 3.

POSTAGE RATE LEGISLATION. See **Appeals**, 1; **Constitutional Law**, VII, 1; **Jurisdiction.**

POST-CONVICTION RELIEF. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Procedure**, 1.

PRELIMINARY HEARINGS. See **Constitutional Law**, VI; **Mootness**; **Witnesses.**

PREPARATIONS FOR COMMITTEE MEETINGS. See **Appeals**, 2–3; **Constitutional Law**, VII, 2–6; **Grand Juries**, 2–3, 5.

PRETRIAL STATEMENTS. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Procedure**, 1.

PRETRIAL SUPPRESSION HEARINGS. See **Constitutional Law**, V; **Evidence**, 3.

PRIOR HEARINGS. See **Constitutional Law**, I, 5; **Procedure**, 3.

PRIOR RESTRAINTS. See **Constitutional Law**, III, 2, 4; IV, 2.

PRIOR TESTIMONY. See **Constitutional Law**, VI; **Mootness**; **Witnesses.**

PRISONERS. See **Constitutional Law**, I, 1–2, 4; **Paroles**, 1–3.

PRISON HOSPITALS. See **Confessions**; **Constitutional Law**, IV, 1.

PRIVACY OF COMMUNICATIONS. See **Grand Juries**, 1.

PRIVATE PUBLICATION. See **Appeals**, 2–3; **Constitutional Law**, VII, 2–6; **Grand Juries**, 2–3, 5.

PRIVILEGE. See **Appeals,** 1; **Constitutional Law,** VII, 1; **Jurisdiction.**

PROBABLE CAUSE. See **Constitutional Law,** V; **Evidence,** 3.

PROBATIONARY PERIODS. See **Constitutional Law,** I, 5; III, 9; **Procedure,** 2–3.

PROCEDURAL DUE PROCESS. See **Constitutional Law,** I, 3; II, 1; III, 2, 4, 9; IV, 2; **Criminal Law,** 2–4; **Evidence,** 1–2; **Procedure,** 1–3.

PROCEDURE. See also **Administrative Procedure,** 1–5; **Confessions; Constitutional Law,** I, 1–5; II, 1; III, 3, 9; IV, 1; V; **Criminal Law,** 2–4; **Evidence,** 1–3; **Grand Juries,** 1; **Interstate Commerce Commission,** 1–5; **Justiciability; Judicial Review,** 2–6; **Paroles,** 1–3.

1. *Due process—Other shotgun improperly admitted into evidence—Claim not raised below.*—Petitioner's due process claim as to the shotgun was not previously raised and therefore is not properly before this Court, and in any event the introduction of the shotgun does not constitute federally reversible error. Moore v. Illinois, p. 786.

2. *Professor's one-year employment contract not renewed—College's de facto tenure policy.*—Though a subjective "expectancy" of tenure is not protected by procedural due process, respondent's allegation that the college had a *de facto* tenure policy, arising from rules and understandings officially promulgated and fostered, entitled him to an opportunity of proving the legitimacy of his claim to job tenure. Such proof would obligate the college to afford him a requested hearing where he could be informed of the grounds for his nonretention and challenge their sufficiency. Perry v. Sindermann, p. 593.

3. *Teacher hired for one academic year—Not rehired for ensuing year—No prior hearing.*—The Fourteenth Amendment does not require opportunity for a hearing prior to the nonrenewal of a nontenured state teacher's contract, unless he can show that the nonrenewal deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, despite the lack of tenure or a formal contract. Here the nonretention of respondent, absent any charges against him or stigma or disability foreclosing other employment, is not tantamount to a deprivation of "liberty," and the terms of his employment accorded him no "property" interest protected by procedural due process. Board of Regents v. Roth, p. 564.

PROFESSORS. See **Constitutional Law**, III, 9; **Procedure**, 2.

PROPRIETARY CLAIMS. See **Constitutional Law**, V; **Evidence**, 3.

PROSECUTORS. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Procedure**, 1.

PROTECTED INTERESTS. See **Constitutional Law**, I, 5; **Procedure**, 3.

PROTECTED LEGISLATIVE ACTS. See **Appeals**, 2–3; **Constitutional Law**, VII, 2–6; **Grand Juries**, 2–3, 5.

PROTECTION OF SOURCES. See **Constitutional Law**, III, 8; **Grand Juries**, 4.

PROTECTIVE CONDITIONS. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

PUBLICATION OF PENTAGON PAPERS. See **Appeals**, 2–3; **Constitutional Law**, VII, 2–6; **Grand Juries**, 2–3, 5.

PUBLIC INTEREST. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

PUBLIC OFFICIALS. See **Appeals**, 1; **Constitutional Law**, VII, 1; **Jurisdiction.**

PUBLIC RECORD. See **Appeals**, 2–3; **Constitutional Law**, VII, 2–6; **Grand Juries**, 2–3, 5.

PUBLIC SCHOOLS. See **Constitutional Law**, I, 5; III, 5–6, 9; **Procedure**, 2–3.

PUBLIC STATEMENTS. See **Constitutional Law**, III, 9; **Procedure**, 2.

PUBLIC UTILITY COMMISSIONS. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

PUBLISHERS. See **Appeals**, 2–3; **Constitutional Law**, VII, 2–6; **Grand Juries**, 2–3, 5.

PUNISHMENTS. See **Constitutional Law**, VI; **Mootness**; **Witnesses.**

QUALIFIED TESTIMONIAL PRIVILEGE. See **Constitutional Law**, III, 8; **Grand Juries**, 4.

RAILROAD MERGERS. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

RAPE. See **Constitutional Law**, II, 2; **Criminal Law**, 1.

RATES. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

RE-EMPLOYMENT. See **Constitutional Law**, I, 5; III, 9; **Procedure**, 2–3.

REFUSAL TO TESTIFY. See **Grand Juries**, 1.

REGENTS. See **Constitutional Law**, I, 5; III, 9; **Procedure**, 2–3.

REHABILITATION. See **Constitutional Law**, I, 1–2, 4; **Paroles**, 1–3.

RELIEF. See **Constitutional Law**, III, 2–4; IV, 2; **Justiciability.**

REPORTER'S PRIVILEGE STATUTES. See **Constitutional Law**, III, 8; **Grand Juries**, 4.

REPRISALS. See **Constitutional Law**, III, 9; **Procedure**, 2.

REPUBLICATIONS. See **Appeals**, 2–3; **Constitutional Law**, VII, 2–6; **Grand Juries**, 2–3, 5.

RES JUDICATA. See **Constitutional Law**, VI; **Mootness**; **Witnesses.**

RETAINED CONTROL. See **Taxes**, 1–3.

RETALIATION. See **Constitutional Law**, III, 9; **Procedure**, 2.

RETRIBUTION. See **Constitutional Law**, II, 2; **Criminal Law**, 1.

REVOCATION OF PAROLE. See **Constitutional Law**, I, 1–2, 4; **Paroles**, 1–3.

RIGHT OF FREE SPEECH. See **Constitutional Law**, III, 9; **Procedure**, 2.

RIGHT TO CONFRONT WITNESSES. See **Constitutional Law**, I, 1–2, 4; VI; **Mootness**; **Paroles**, 1–3; **Witnesses.**

RIGHT TO RECEIVE INFORMATION. See **Constitutional Law**, III, 1; **Immigration and Nationality Act**; **Judicial Review**, 1.

RIGHT TO VOTE STOCK. See **Taxes**, 1–3.

RIVERGATE. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

ROCKFORD. See **Constitutional Law**, III, 6.

SALE OF STOCK. See **Taxes**, 1–3.

SCENE OF THE CRIME. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Procedure**, 1.

SCHOOLS. See **Constitutional Law**, I, 5; III, 2, 4–6, 9; IV, 2; **Procedure**, 2–3.

SCOPE OF PRIVILEGE. See **Appeals**, 1; **Constitutional Law**, VII, 1; **Jurisdiction.**

SDS. See **Constitutional Law**, III, 2, 4; IV, 2.

SEARCH AND SEIZURE. See **Constitutional Law**, V; **Evidence**, 3.

SECOND-OFFENDER SENTENCES. See **Constitutional Law**, VI; **Mootness**; **Witnesses.**

"SECRET" DOCUMENTS. See **Appeals**, 2–3; **Constitutional Law**; VII, 2–6; **Grand Juries**, 2–3, 5.

SECURITIES. See **Taxes**, 1–3.

SELECTIVE EXCLUSIONS. See **Constitutional Law**, III, 5–6.

SELF-CENSORSHIP. See **Constitutional Law**, III, 8; **Grand Juries**, 4.

SENATORS. See **Appeals**, 1–3; **Constitutional Law**, VII, 1–6; **Grand Juries**, 2–3, 5; **Jurisdiction.**

SENTENCES. See **Constitutional Law**, I, 1–2, 4; II, 2; VI; **Criminal Law**, 1; **Mootness**; **Paroles**, 1–3; **Witnesses.**

SEPARATION OF TEACHERS. See **Constitutional Law**, I, 5; **Procedure**, 3.

SERIOUS ART. See **Constitutional Law**, III, 7.

SETTLORS. See **Taxes**, 1–3.

SEX AND OBSCENITY. See **Constitutional Law**, III, 7.

SHARE OF MARKET. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

SHARES OF STOCK. See **Taxes**, 1–3.

SHIPPERS. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

SHOTGUNS. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Procedure**, 1.

SIXTH AMENDMENT. See **Constitutional Law**, VI; **Mootness**; **Witnesses.**

SMALL BUSINESSES. See **Taxes**, 1–3.

SOURCES OF INFORMATION. See **Constitutional Law**, III, 8; **Grand Juries**, 4.

SOUTHERN PACIFIC RAILROAD. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

SOUTHERN PACIFIC TRANSPORTATION CO. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

SOVEREIGNTY. See **Constitutional Law**, III, 1; **Immigration and Nationality Act**; **Judicial Review**, 1.

SPECIFIC FUTURE HARM. See **Constitutional Law**, III, 3; **Justiciability.**

SPEECH OR DEBATE CLAUSE. See **Appeals**, 1–3; **Constitutional Law**, VII, 1–6; **Grand Juries**, 2–3, 5; **Jurisdiction.**

STAFF PERSONNEL. See **Appeals**, 2–3; **Constitutional Law**, VII, 2–6; **Grand Juries**, 2–3, 5.

STANDING TO OBJECT. See **Constitutional Law**, V; **Evidence**, 3.

STATE DEPARTMENT. See **Constitutional Law**, III, 1; **Immigration and Nationality Act**; **Judicial Review**, 1.

STATE POLICE. See **Constitutional Law**, V; **Evidence**, 3.

STATE PRISON AUTHORITIES. See **Constitutional Law**, I, 1–2, 4; **Paroles**, 1–3.

STATE-SUPPORTED COLLEGES. See **Constitutional Law**, III, 2, 4; IV, 2.

STATE UNIVERSITIES. See **Constitutional Law**, I, 5; III, 9; **Procedure**, 2–3.

STATUTORY EXCLUSION OF ALIENS. See **Constitutional Law**, III, 1; **Immigration and Nationality Act**; **Judicial Review**, 1.

STATUTORY INVALIDITY. See **Appeals**, 1; **Constitutional Law**, VII, 1; **Jurisdiction.**

STIFFER PUNISHMENTS. See **Constitutional Law**, VI; **Mootness**; **Witnesses.**

STOCKHOLDERS. See **Taxes**, 1–3.

STUDENT ACTIVITIES. See **Constitutional Law**, III, 2, 4; IV, 2.

STUDENTS FOR A DEMOCRATIC SOCIETY. See **Constitutional Law**, III, 2, 4; IV, 2.

SUBCOMMITTEE MEETINGS. See **Appeals**, 2–3; **Constitutional Law**, VII, 2–6; **Grand Juries**, 2–3, 5.

SUBPOENAS. See **Appeals**, 2–3; **Constitutional Law**, III, 8; VII, 2–6; **Grand Juries**, 2–5.

SUMMARY JUDGMENTS. See **Appeals**, 1; **Constitutional Law**, I, 5; VII, 1; **Jurisdiction; Procedure**, 3.

SUPPRESSION MOTIONS. See **Constitutional Law**, V; **Evidence**, 3.

SUPPRESSION OF EVIDENCE. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Grand Juries**, 1; **Procedure**, 1.

SURVEILLANCES. See **Constitutional Law**, III, 3; **Justiciability.**

SWEDEN. See **Constitutional Law**, VI; **Mootness; Witnesses.**

SWITCHING RAILROADS. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

TAVERNS. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Procedure**, 1.

TAXES.

1. *Irrevocable inter vivos trust—Retention of managerial powers—Inclusion of value of trust property in decedent's gross estate.*—Decedent did not retain the "right," within the meaning of § 2036 (a) (2) of the Internal Revenue Code of 1954, to designate who was to enjoy the trust income. A settlor's retention of broad management powers does not necessarily subject an *inter vivos* trust to the federal estate tax. United States v. Byrum, p. 125.

2. *Irrevocable inter vivos trust—Retention of voting control.*—Decedent's voting control of the stock did not constitute retention of the enjoyment of the transferred stock within the meaning of § 2036 (a) (1) of the Internal Revenue Code of 1954, since the decedent had transferred irrevocably the title to the stock and right to the income therefrom. United States v. Byrum, p. 125.

3. *Irrevocable inter vivos trust—Right to vote a majority of shares.*—In view of legal and business constraints applicable to the payment of dividends, especially where there are minority stockholders, decedent's right to vote a majority of the shares in these corporations did not give him a *de facto* position tantamount to the power to accumulate income in the trust. United States v. Byrum, p. 125.

TEACHERS. See **Constitutional Law**, I, 5; III, 9; **Procedure**, 2–3.

TEMPORARY VISAS. See **Constitutional Law**, III, 1; **Immigration and Nationality Act**; **Judicial Review**, 1.

TENNESSEE. See **Confessions**; **Constitutional Law**, IV, 1; VI; **Mootness**; **Witnesses.**

TENURE. See **Constitutional Law**, I, 5; III, 9; **Procedure**, 2–3.

TERMINAL FACILITIES. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

TESTIMONIAL PRIVILEGE. See **Appeals**, 2–3; **Constitutional Law**, VII, 2–6; **Grand Juries**, 2–3, 5.

TESTIMONY. See **Constitutional Law**, I, 3; II, 1; III, 8; VI; **Criminal Law**, 2–4; **Evidence**, 1–2; **Grand Juries**, 4; **Mootness**; **Procedure**, 1; **Witnesses.**

TEXAS. See **Constitutional Law**, II, 2; III, 9; VI; **Criminal Law**, 1; **Mootness**; **Procedure**, 2; **Witnesses.**

THREE-JUDGE COURTS. See **Administrative Procedure**, 1–5; **Constitutional Law**, III, 1; **Immigration and Nationality Act**; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 1–6.

"TOP SECRET" DOCUMENTS. See **Appeals**, 2–3; **Constitutional Law**, VII, 2–6; **Grand Juries**, 2–3, 5.

TRACKAGE RIGHTS. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

TRANSACTIONAL IMMUNITY. See **Grand Juries**, 1.

TRANSCRIPTS. See **Constitutional Law**, VI; **Mootness**; **Witnesses.**

TRANSFER OF STOCK. See **Taxes**, 1–3.

TRANSPORTATION ACTS. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

TRIALS. See **Constitutional Law**, I, 3; II, 1; V; VI; **Criminal Law**, 2–4; **Evidence**, 1–3; **Mootness**; **Procedure**, 1; **Witnesses.**

TRUSTEES. See **Taxes**, 1–3.

TRUST PROPERTY. See **Taxes**, 1–3.

UNAUTHORIZED INTERCEPTIONS. See **Grand Juries**, 1.

UNAVAILABILITY OF WITNESSES. See **Constitutional Law**, VI; **Mootness**; **Witnesses.**

UNCORRECTED FALSE EVIDENCE. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2–4; **Evidence**, 1–2; **Procedure**, 1.

UNDERGROUND NEWSPAPERS. See **Constitutional Law**, III, 7.

UNEQUAL PENALTIES. See **Constitutional Law**, II, 2; **Criminal Law**, 1.

UNEQUAL TREATMENT. See **Constitutional Law**, III, 5.

UNION PACIFIC RAILROAD. See **Administrative Procedure**, 1–5; **Interstate Commerce Commission**, 1–5; **Judicial Review**, 2–6.

UNITED STATES SENATORS. See **Appeals**, 1–3; **Constitutional Law**, VII, 1–6; **Grand Juries**, 2–3, 5; **Jurisdiction.**

UNIVERSITIES. See **Constitutional Law**, I, 5; **Procedure**, 3.

UNIVERSITY STUDENTS. See **Constitutional Law**, III, 2, 4; IV, 2.

UNLISTED CORPORATIONS. See **Taxes**, 1–3.

UNUSUAL PUNISHMENT. See **Constitutional Law**, II, 2; **Criminal Law**, 1.

VAGUENESS. See **Constitutional Law**, III, 6.

VALIDITY OF STATUTES. See **Appeals**, 1; **Constitutional Law**, VII, 1; **Jurisdiction.**

VIETNAM WAR. See **Appeals**, 2–3; **Constitutional Law**, VII, 2–6; **Grand Juries**, 2–3, 5.

VIOLATIONS OF PAROLE. See **Constitutional Law**, I, 1–2, 4; **Paroles**, 1–3.

VIOLENCE. See **Constitutional Law**, III, 3; **Justiciability.**

VISAS. See **Constitutional Law**, III, 1; **Immigration and Nationality Act**; **Judicial Review**, 1.

VOID FOR VAGUENESS. See **Constitutional Law**, III, 6.

VOTING CONTROL OF STOCK. See **Taxes**, 1–3.

WAIVER PROCEDURE. See **Constitutional Law**, III, 1; **Immigration and Nationality Act**; **Judicial Review**, 1.

WARRANTS. See **Constitutional Law**, V; **Evidence**, 3.

WHISKEY. See **Constitutional Law**, V; **Evidence**, 3.

WIRETAPS. See **Grand Juries**, 1.

WISCONSIN. See **Constitutional Law,** I, 5; III, 7; **Procedure,** 3.

WISCONSIN STATE UNIVERSITY. See **Constitutional Law,** I, 5; **Procedure,** 3.

WITNESSES. See also **Appeals,** 2–3; **Constitutional Law,** I, 1–4; II, 1; III, 8; VI; VII, 2–6; **Criminal Law,** 2–4; **Evidence,** 1–2; **Grand Juries,** 1–5; **Mootness; Paroles,** 1–3; **Procedure,** 1.

First conviction voided—Victim, previous witness, moved permanently to foreign country—Unavailable during second trial.—Upon discovering that a State's witness had removed himself permanently to a foreign country, the State of Tennessee was powerless to compel his attendance at respondent's second trial; the resultant predicate of unavailability was sufficiently strong not to warrant a federal habeas corpus court's upsetting the State's determination that the witness was not available. Mancusi v. Stubbs, p. 204.

WORDS AND PHRASES.

1. *"[E]njoyment of the property" transferred.* Internal Revenue Code of 1954, § 2036 (a)(1); 26 U. S. C. § 2036 (a)(1). United States v. Byrum, p. 125.

2. *"[T]he right, either alone or in conjunction with any person, to designate the persons who shall . . . enjoy . . . the income therefrom."* Internal Revenue Code of 1954, § 2036 (a)(2); 26 U. S. C. § 2036 (a)(2). United States v. Byrum, p. 125.

WOUNDED PRISONERS. See **Confessions; Constitutional Law,** IV, 1.

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